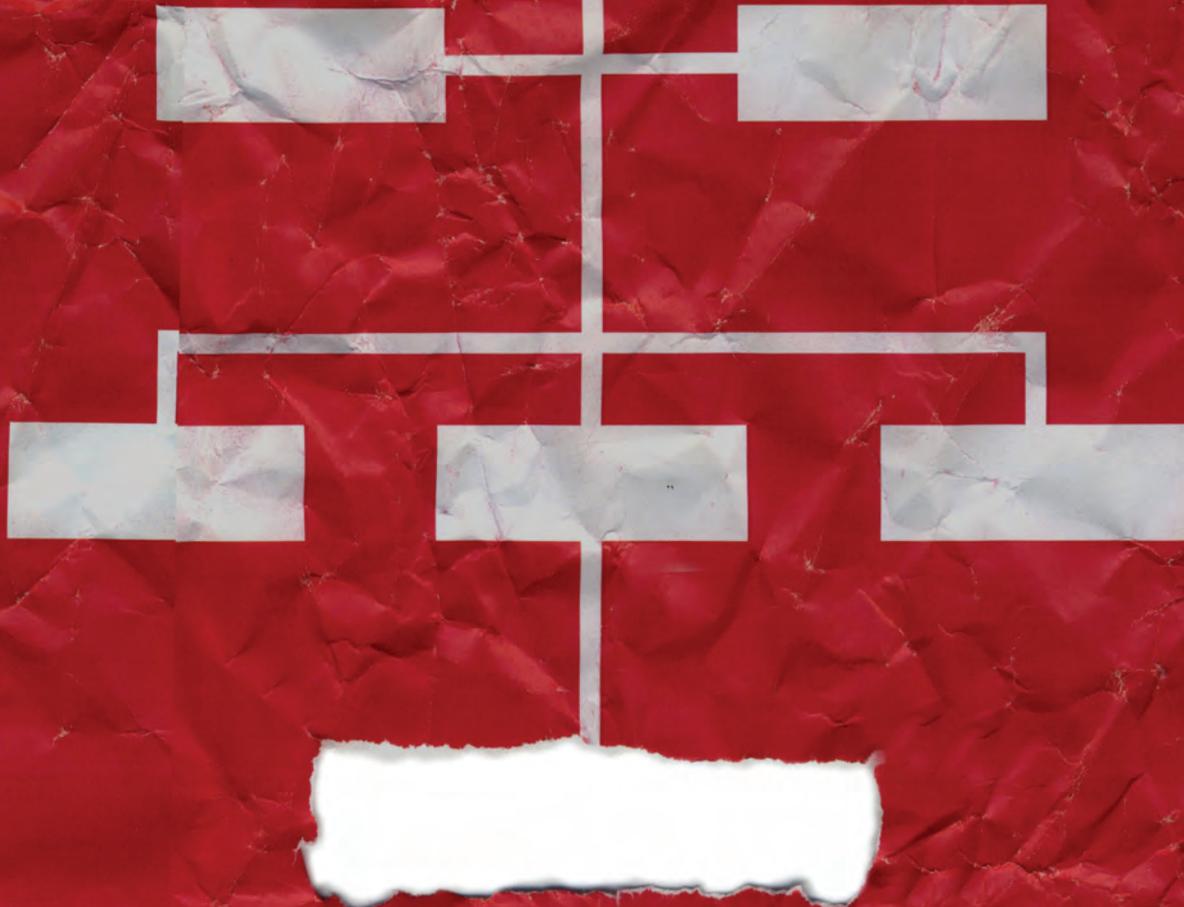




Victorian
Law Reform
Commission

The Forfeiture Rule

CONSULTATION PAPER
MARCH 2014





Published by the Victorian Law Reform Commission

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Foreword

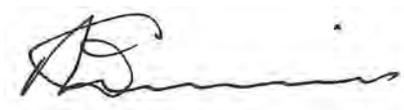
Having completed a major review of succession laws in 2013,¹ the Commission welcomes the referral of this related but distinct area of the law.

The forfeiture rule arises from a fundamental principle that is at the heart of our legal system: no one should benefit from their criminal conduct. At the same time, it is sharply focused on a specific source of gain: homicide.

This, the most serious of crimes, is sanctioned by the harshest of sentences. The forfeiture rule, that no one who unlawfully kills another can share in the victim's estate or receive any other financial gain from the death, appears appropriate and immutable.

Experience in applying the rule has shown that the effect of the rule is not always fair. The Commission's reference provides the opportunity to review the operation of the rule and the steps that have been taken elsewhere in Australia and overseas to address the injustices that can arise, yet preserve the underlying principle.

This consultation paper opens discussions about the issues arising from the terms of reference. I encourage anyone who has experience in the application of the forfeiture rule or other insights into the questions raised in the paper to make a submission by 28 April 2014.



The Hon. P. D. Cummins

Chair

Victorian Law Reform Commission

February 2014

Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions, listed on page 62, that seek to guide submissions. You do not have to address all of the questions to make a submission.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

How do I make a submission?

You can make a submission in writing, or verbally to one of the Commission staff if you need assistance. There is no required format for submissions. However, we encourage you to answer the questions on page 62.

Submissions can be made by:

Email: law.reform@lawreform.vic.gov.au

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

Assistance

Please contact the Commission if you require an interpreter or assistance to make a submission.

Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published.

The views expressed in the submissions are those of the individuals or organisations that submit them and their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the final report is tabled in Parliament. Hard copies of submissions will be archived and sent to the Public Record Office Victoria.

The Commission also accepts submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.foi.vic.gov.au.

Please note that submissions which do not have an author's or organisation's name attached will not be published on the Commission's website or made publicly available and will be treated as confidential submissions.

Confidentiality

When you make a submission, you must decide whether you want your submission to be public or confidential.

- **Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Private addresses and contact details will be removed from submissions before they are made public.
- **Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our final reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au

Submission deadline: 28 April 2014

Terms of reference

The Victorian Law Reform Commission is asked to review the common law rule of forfeiture and the circumstances in which it should no longer be appropriate for a person who has killed another person to benefit from that death, including by way of survivorship or as a beneficiary under a will or under intestacy rules.

The Commission should consider existing exceptions to the forfeiture rule, such as where a person is found not guilty of a killing because of mental impairment.

The Commission should make recommendations on the need for legislative or other reform in Victoria to clarify when and/or how the forfeiture rule should be applied, or to replace the common law.

If legislative reform is recommended, the Commission should propose specific legislative mechanisms for giving effect to these recommendations.

The Commission should consider judicial approaches and legislative developments in both Australian and overseas jurisdictions.

The Commission is to report by 15 September 2014.

Glossary

ACT Act	<i>Forfeiture Act 1991</i> (ACT)
Administrator	A person appointed by the court under letters of administration to administer a deceased estate that has no executor. This may be because there is no will, the will does not appoint an executor, or a named executor is unwilling or unable to act.
Duress	Under the <i>Crimes Act 1958</i> (Vic), a person carries out conduct under duress if they reasonably believe that a threat has been made that will be carried out unless an offence is committed, and carrying out that conduct is the only reasonable way that the threatened harm can be avoided. The conduct must be a reasonable response to that threat and will only apply in relation to murder if the threat is to inflict death or really serious injury.
Executor	The person appointed by a will to administer a deceased person's estate.
Family provision	Refers to family provision law, set out in Part IV of the <i>Administration and Probate Act 1958</i> (Vic), which allows a person who believes that a deceased person had a responsibility to provide for them, and did not do so, to apply for a court order to redistribute the estate in their favour.
Intestacy	Occurs when a person dies without having made a valid will, or where their will fails to effectively dispose of all of their property. Intestacy can be partial, where only some of the deceased person's property is effectively disposed of by will, or total, where none of the deceased person's property is effectively disposed of by will.
Joint tenancy	Common ownership of property when all co-owners (or co-tenants) together own the whole piece of property, each having an undivided share. Property that is owned jointly passes to the surviving co-owner or co-owners on the death of one of the co-owners and does not become part of the deceased person's estate. See also survivorship and tenancy in common .
Mental illness	A medical condition that is characterised by a significant disturbance of thought, mood, perception or memory. It can include conditions such as depression, schizophrenic disorders, bipolar affective disorder, obsessive-compulsive disorder and post-traumatic stress disorder.

Mental impairment

Under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), the defence of mental impairment is established if, at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment with the effect that:

- they did not know the nature and quality of their conduct, or
- they did not know that the conduct was wrong (that is, they could not reason with a moderate degree of sense and composure about whether the conduct as perceived by reasonable people, was wrong).

NSW Act

Forfeiture Act 1995 (NSW)

NZ Act

Succession (Homicide) Act 2007 (NZ)

Residuary estate

The remainder of the estate after debts and liabilities are paid, and specific gifts and legacies are distributed.

Self-defence

Under the *Crimes Act 1958* (Vic), a person will not be guilty of murder if their conduct is necessary to defend himself or herself or another person from death or really serious injury. A person will not be guilty of manslaughter if there are reasonable grounds for believing that the conduct is necessary to defend himself or herself or another person; or to prevent or terminate the unlawful deprivation of their liberty or that of another person.

Survivorship

A right in relation to property held by two or more people as joint tenants. Where a co-owner (or co-tenant) dies, their share in the property passes to the surviving co-owner(s). It cannot be given by will. See also **joint tenancy**.

Tenancy in common

A type of co-ownership where multiple parties own distinct interests in the same piece of property. The share owned by a tenant in common forms part of their estate and so can be given by will. See also **joint tenancy**.

UK Act

Forfeiture Act 1982 (UK)

Background

- 2 Referral to the Commission**
- 3 Previous reviews of the rule by law reform bodies**
- 3 Conduct of this reference**

1. Background

Referral to the Commission

- 1.1 On 29 October 2013, the Attorney-General, the Honourable Robert Clark, MP, asked the Victorian Law Reform Commission, under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), to review the common law rule of forfeiture. The terms of reference appear at page viii.
- 1.2 The forfeiture rule is a rule of public policy that a person who unlawfully kills another cannot acquire a benefit as a consequence of the killing. The killer forfeits any entitlement to inherit from the victim, either under the victim's will or, if no will disposes of all of the victim's estate, under intestacy law.¹ If the killer and victim were co-owners of property as joint tenants, the rule prevents the property from passing to the killer.²
- 1.3 The rule was created by the courts and has no statutory basis.³ It applies where the court is satisfied, in civil proceedings, that the killing was unlawful. There is no requirement for the person to have been convicted in criminal proceedings, where guilt must be proved beyond reasonable doubt. The rule may be applied to a person who has been acquitted, or has not been prosecuted at all, if it is proved to the court, on the balance of probabilities, that the person unlawfully killed the deceased.⁴ The only exception is if the person is not guilty because of mental impairment.⁵
- 1.4 In Victoria, the rule applies equally and inflexibly in all circumstances but the outcome can be harsh. Both a premeditated murder carried out with the intention of obtaining a financial benefit, and a suicide pact in which one of the parties survived, would attract the application of the rule.
- 1.5 In the United Kingdom, the *Forfeiture Act 1982* (UK) (the UK Act) gives a court the discretion to modify the effect of the rule if required by the justice of the case, unless the offender was convicted of murder. The Australian Capital Territory and New South Wales have similar legislation, based on the UK Act: the *Forfeiture Act 1991* (ACT) (the ACT Act) and the *Forfeiture Act 1995* (NSW) (the NSW Act).

1 In Victoria, property is distributed on intestacy in accordance with a scheme established by pt 1 div 6 of the *Administration and Probate Act 1958* (Vic).

2 Normally, when a joint tenant dies, the property passes to the surviving co-owner or co-owners and does not form part of the deceased's estate. See Chapter 4 for discussion about the effect of the rule on a joint tenancy.

3 See Chapter 2 for discussion about the development of the rule.

4 *Helton v Allen* (1940) 63 CLR 691.

5 *Estate of Soukup* (1997) 97 A Crim R 103, 115.

- 1.6 New Zealand has also introduced legislation but has taken a quite different approach. The *Succession (Homicide) Act 2007* (NZ) (the NZ Act) codifies and replaces the common law rule completely. It specifies when the rule may apply and how it affects the distribution of property to which the killer would otherwise have been entitled upon the victim's death.
- 1.7 The terms of reference call for the Commission to review the circumstances in which the forfeiture rule is applied and make recommendations on the need for legislative or other reform to clarify or replace the common law in Victoria. In doing so, the Commission has been asked to consider judicial approaches and legislative developments both in Australia and overseas.
- 1.8 It is important to note that the scope of the Commission's review is determined by the terms of reference and cannot extend to a wider examination of the law in Victoria concerning homicide, succession on death, the forfeiture of the proceeds of crime or any other related areas of law.
- 1.9 The Commission is to report by 15 September 2014.

Previous reviews of the rule by law reform bodies

- 1.10 Although this reference is the first public review of the forfeiture rule in Victoria, the Commission is able to draw upon the results of earlier reviews by law reform bodies, both in this state and in other jurisdictions. These bodies include:
- the Law Commission of New Zealand⁶
 - the Scottish Law Commission⁷
 - the Law Commission for England and Wales⁸
 - the Tasmania Law Reform Institute⁹
 - the former Victorian Law Reform Advisory Council.¹⁰
- 1.11 The reports and other papers that these bodies have produced provide a rich account of the law and are recommended reading for anyone who wishes to explore the issues arising from the Commission's terms of reference in more detail.

Conduct of this reference

Division

- 1.12 The Chair of the Commission has exercised his powers under section 13(1)(b) of the Victorian Law Reform Commission Act to constitute a Division to guide and oversee the conduct of the reference.
- 1.13 Joining him on the Division are Commissioners Bruce Gardner PSM, Dr Ian Hardingham QC, the Hon. David Jones AM, Eamonn Moran PSM QC, Alison O'Brien and the Hon. Frank Vincent AO QC.

⁶ Law Commission (New Zealand), *Succession Law: Homicidal Heirs*, Report No 38 (1997).

⁷ Scottish Law Commission, *Report on Succession*, Scot Law Com No 124 (1989); *Report on Succession*, Scot Law Com No 215 (2009).

⁸ Law Commission (England and Wales), *The Forfeiture Rule and the Law of Succession*, Cm 6625 (2005).

⁹ Tasmania Law Reform Institute, *The Forfeiture Rule*, Final Report No 6 (2004).

¹⁰ Richard Boaden, 'The "Forfeiture Rule"' (Discussion Paper, Law Reform Advisory Council, 1995).

Consultation paper and submissions

- 1.14 This paper draws from the preliminary research conducted by Commission staff. It describes the law, identifies and asks questions about the issues arising from the terms of reference and explores options for reform. The questions are listed on page 62.
- 1.15 The Commission is seeking submissions in response to the questions in the consultation paper by 28 April 2014. Information about how to make a submission is set out on page vi.

The forfeiture rule

- 6** **Origin and development of the rule**
- 11** **The rule as it applies in Victoria**
- 12** **Legislative responses**

2. The forfeiture rule

Origin and development of the rule

Cleaver v Mutual Reserve Fund Life Association

- 2.1 The forfeiture rule is consistent with the long-standing legal maxim that no one can derive an advantage from his or her own criminal wrongdoing. The rule was first enunciated in the 1891 decision of the English Court of Appeal in *Cleaver v Mutual Reserve Fund Life Association (Cleaver)*.¹
- 2.2 In *Cleaver*, the Court held that a woman who had been convicted for murdering her husband could not claim the proceeds of her husband's insurance policy. Lord Esher MR stated that '[t]he rule of public policy in such a case prevents the person guilty of the death of the insured, or any person claiming through such person, from taking the money'.²
- 2.3 Lord Justice Fry agreed:
- It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.³
- 2.4 He observed that, although there may have been no authority directly asserting that it existed, the public policy rule had been illustrated in *Fauntleroy's Case*.⁴ In that case, the House of Lords considered whether an insurance company had to pay money due under a life insurance policy upon the death of a policy-holder who had been convicted and hanged for forgery. The House of Lords held that there was no obligation to pay as directed by the policy-holder because his death was brought about by his having committed a capital felony.
- 2.5 Lord Justice Fry described the rule in *Cleaver* as a principle of public policy that should be applied broadly:
- This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion... It would equally apply, it appears to me, to the case of a cestui que trust asserting a right as such by reason of the murder of the prior tenant for life or of the assured in a policy; and it must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed as subject to it.⁵

1 [1892] 1 QB 147.

2 Ibid 155.

3 Ibid 156.

4 *Amicable Society for a Perpetual Life Assurance Office v Bollard* (1830) 4 Bli NS 194; 5 ER 70 (*Fauntleroy's Case*); *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 156.

5 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 156–7.

- 2.6 Having been formulated in *Cleaver*, the principle was established as an absolute rule in *In the Estate of Hall*.⁶ In that case, the rule was held to apply to both manslaughter and murder. Lord Justice Hamilton said:

[It is] [t]rue that [*Cleaver*] was a case of murder, but I do not think that, by using terms wide enough to cover manslaughter, the members of the Court supposed themselves to be speaking obiter, or were in fact doing so. The principle can only be expressed in that wide form. It is that a man shall not slay his benefactor and thereby take his bounty; and I cannot understand why a distinction should be drawn between the rule of public policy where the criminality consists in murder and the rule where the criminality consists in manslaughter.⁷

- 2.7 This statement was approved, and the forfeiture rule was effectively endorsed, by the joint judgment of the High Court of Australia in *Helton v Allen*.⁸

Subsequent development

- 2.8 The forfeiture rule emerged following the statutory abolition of the common law doctrines of forfeiture: attainder, forfeiture, corruption of blood and escheat. Attainder and escheat provided for the property of a convicted murderer or any other felon to be forfeited to the Crown; corruption of blood prevented an attainted person from inheriting or transmitting land. The *Forfeiture Act 1870* abolished all of these doctrines in England for 'any treason or felony'.⁹ Equivalent legislation was introduced in Victoria in 1878.¹⁰ The forfeiture rule provided a policy setting for judicial decision making in place of the old doctrines.¹¹
- 2.9 Following the formulation of the rule in *Cleaver*, courts in Australia and the United Kingdom sought to clarify when it applies, how it operates and the consequences for the distribution of the deceased person's estate.
- 2.10 *In the Estate of Hall* established that the rule applies to manslaughter as well as murder but it is less clear whether it applies to all forms of manslaughter, including when arising from negligence, inadvertent or involuntary acts or omissions.
- 2.11 *Cleaver* concerned benefits under a life insurance contract. It is well settled that the rule also applies to the distribution of the deceased person's estate either under a will¹² or, where there is no will, under a statutory scheme.¹³ In addition, the scope of the rule extends beyond the deceased person's estate to the rights over property that a killer co-owned with the victim as joint tenants.¹⁴ However, as discussed in Chapter 4, various approaches are taken to determining how the property should pass, and to whom.

6 [1914] P 1.

7 Ibid 7.

8 (1940) 63 CLR 691, 709 (Dixon, Evatt and McTiernan JJ).

9 *Forfeiture Act 1870*, 33 & 34 Vict, c 23, s 1: 'From and after the passing of this Act no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* [suicide] shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry.'

10 *An Act to abolish forfeitures for Treason and Felony and to otherwise amend the law relating thereto 1878*. The other colonies passed similar legislation: *Forfeitures for Treason and Felony Abolition Act 1873* (WA); *Treason and Felony Forfeiture Act 1874* (SA); *Criminal Law Procedure Act 1881* (Tas); *Criminal Law Amendment Act 1883* (NSW); *Escheat (Procedure and Amendment) Act 1891* (Qld).

11 Andrew Hemming has described forfeiture in Australia after the old doctrines in all jurisdictions were abolished as 'a "tabula rasa" awaiting the common law adoption of a principle of public policy': 'Killing the Goose and Keeping the Golden Nest Egg' (2008) 8 *Queensland University of Technology Law & Justice Journal* 342, 346.

12 *In the Estate of Hall* [1914] P 1.

13 *Re Tucker* (1920) 21 SR (NSW); 38 WN (NSW) 28; *Re Sangal* [1921] VLR 355.

14 *Rasmanis v Jurewitsch* (1969) 90 WN (NSW) (Pt 2) 154.

- 2.12 The application of the rule is determined by the court in its civil jurisdiction, usually when determining how the deceased person's estate should be distributed. This would follow the conclusion of any criminal proceedings but the guilty person need not have been convicted of a crime. In *Helton v Allen*,¹⁵ the High Court held that the rule may apply to a person who has been acquitted in criminal proceedings and that, moreover, the acquittal would not be admissible as evidence of the person's innocence.
- 2.13 There is an exception to the forfeiture rule at common law.¹⁶ A person who is found not guilty because of mental impairment will not be prevented from taking a share of the deceased's estate. They have not been convicted of a crime because they did not know the nature and quality of the act they committed, or that what they were doing was wrong.
- 2.14 Although these features of the rule can be distilled from the cases, there has been, and remains, uncertainty about its scope and effect. Looking back on the origin and development of the rule a century after *Cleaver*, President Kirby observed:
- The difficulty was that the [forfeiture] rule was devised by judges to solve the necessities of particular cases. It developed without a great deal of consideration, either of its scope, or of its exceptions, or of its fundamental underlying rationale. The result has been controversy as to the scope, uncertainty about the exceptions, and confusion as to the rationale.¹⁷

Departure from the inflexible application of the rule

- 2.15 A fundamental point of controversy has been whether, at common law, the court has discretion not to apply the rule in a manslaughter case in view of the nature of the homicide, or the moral culpability of the killer.

Application to different forms of manslaughter

- 2.16 In the 1970 case of *Gray v Barr*,¹⁸ the English Court of Appeal applied the forfeiture rule to a man who had accidentally shot his wife's lover. He had been acquitted in criminal proceedings of murder and manslaughter but, in subsequent civil proceedings in the High Court, Justice Lane found manslaughter and applied the rule.¹⁹
- 2.17 Although the Court of Appeal upheld this decision, it recognised that there are circumstances where, in the event of manslaughter, it would not be appropriate to apply the rule. Lord Justice Salmon said:
- I am not deciding that a man who has committed manslaughter would, in any circumstances, be prevented from enforcing a contract of indemnity in respect of any liability he may have incurred for causing death or from inheriting under a will or upon the intestacy of anyone whom he has killed. Manslaughter is a crime which varies infinitely in its seriousness. It may come very near to murder or amount to little more than inadvertence, although in the latter class of case the jury only rarely convicts.²⁰
- 2.18 Lord Denning agreed with the following test, set out by Justice Lane, for determining when to apply the rule:

The logical test, in my judgment, is whether the person seeking the indemnity was guilty of deliberate, intentional and unlawful violence or threats of violence. If he was, and death resulted therefrom, then, however unintended the final death of the victim may have been, the court should not entertain a claim for indemnity.²¹

15 (1940) 63 CLR 691.

16 *Re Houghton* [1915] 2 Ch 173.

17 *Troja v Troja* (1994) 33 NSWLR 269, 278.

18 *Gray v Barr* [1970] 2 QB 626; [1971] 2 QB 554.

19 *Gray v Barr* [1970] 2 QB 626, 640 (Justice Lane).

20 *Gray v Barr* [1971] 2 QB 554, 581.

21 *Gray v Barr* [1970] 2 QB 626, 640 (Justice Lane); [1971] 2 QB 554, 568–9 (Lord Denning MR).

- 2.19 The test in *Gray v Barr* did not modify the application of the rule in that case, and did not have a meaningful impact on the rule generally.²² In *R v National Insurance Commissioner, Ex parte Connor*, the English High Court considered whether Mrs Connor, who said that she had killed her husband by accident during an argument, was entitled to a widow's pension. Mrs Connor had been convicted of manslaughter and placed on probation for two years. Although it took account of the *Gray v Barr* test and endorsed Lord Justice Salmon's comments about the need to be able to apply the rule more flexibly,²³ the court applied the forfeiture rule because 'the killing was deliberate, conscious and intentional'.²⁴
- 2.20 The automatic and inflexible application of the forfeiture rule was at odds with developments in family law during the 1970s. The decision in *R v National Insurance Commissioner, Ex parte Connor* in 1981 gave impetus to the introduction of the UK Act the following year.²⁵ The UK Act gives the court statutory discretion to take into account the circumstances of the case when applying the rule and is discussed later in this chapter.

Consideration of moral culpability

- 2.21 Australia did not pursue the approach conveyed by the test in *Gray v Barr*, which focuses on the presence of deliberate, intentional and unlawful violence. During the 1980s a number of cases in Australia advanced the view that the court had discretion in applying the rule.
- 2.22 These were cases where a person had been killed in the context of family violence and the court decided not to apply the rule in view of the killer's low level of moral culpability.²⁶ This is in contrast to the traditional formulation of the rule, whereby moral culpability is not taken into account.
- 2.23 In *Public Trustee v Evans*,²⁷ the rule was not applied to a woman who had killed her husband after he had assaulted her and her daughter, and had then told her that he was going to kill the children. Justice Young observed that:
- The rule we are applying here is essentially a judge-made rule, it is a rule of public policy and it is open to a judge whilst recognising the importance of all that has been said beforehand, to make the pronouncement if he thinks it appropriate as to the limitations of the rule for his particular age.²⁸
- 2.24 Although the rule was applied in *Public Trustee v Fraser*²⁹ to prevent a son who had killed his mother from inheriting from her estate, Justice Kearney agreed with the comments made by Justice Young in *Public Trustee v Evans*. Justice Kearney considered that the court had a discretion to grant relief against the effect of the rule in view of the nature of the crime and the moral culpability of the offender:

I consider the fundamental question is to determine whether the taking of a benefit by a person through his crime would be unconscionable as representing an unjust enrichment of that person so as to attract the public policy rule.³⁰

22 Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1, 8.

23 *R v National Insurance Commissioner, Ex parte Connor* [1981] 1 QB 758, 765.

24 *Ibid* 766.

25 Richard Boaden, 'The "Forfeiture Rule"' (Discussion Paper, Law Reform Advisory Council, 1995), 9; Andrew Hemming, above n 11, 352.

26 A notable exception is *Permanent Trustee Co Ltd v Freedom from Hunger Campaign* (1991) 25 NSWLR 140. In that case, Justice Rolfe held that a husband who committed suicide, having first assisted his wife to do so, did not undertake these actions with the intention to derive any benefit from his wife's estate. For this reason, and not because of any consideration of moral turpitude or unconscionability, it was inappropriate to apply the forfeiture rule. This case was overruled in *Troja v Troja* (1994) 33 NSWLR 269.

(1985) 2 NSWLR 188.

27 *Ibid* 192.

28 *Public Trustee v Fraser* (1987) 9 NSWLR 433.

29 *Ibid* 444.

30

2.25 In *Re Keitley*³¹ and *Miliankos v Miliankos*,³² the Supreme Court of Victoria followed the approach taken in New South Wales in *Public Trustee v Evans* and *Public Trustee v Fraser*. In *Re Keitley*, Justice Coldrey declined to apply the rule where a woman, Mrs Keitley, had killed her husband out of fear that he would kill her. Justice Coldrey noted that the trial judge had accepted that Mrs Keitley's level of moral culpability was 'much less than is normally encountered in this court'.³³ He concluded that:

It is neither possible nor desirable to seek to lay down a list of factors that may give rise to relief from the forfeiture rule. Suffice to say that the present case is not one in which the rule should operate to prevent the granting of probate.³⁴

2.26 *Miliankos v Miliankos* concerned an application by a man for a declaration that his younger brother, who had killed their father, had forfeited any claim to the benefit of their father's estate. Justice Nathan applied *Re Keitley* and considered that the fundamental question for the court was:

[t]o determine whether the taking of a benefit by the younger brother through his crime would be unconscionable as representing an unjust enrichment to him so as to attract the rule of public policy, that is, the judge made rule that a person should not benefit from the commission of a crime.³⁵

2.27 He declined to make the declaration because the moral culpability which should attach to the younger brother was of a low order, and 'not of such a high order that the public policy is best served by saying he should become disentitled to a share of his father's bounty'.³⁶

Reinstatement of the traditional formulation

2.28 The exploration of alternatives to the traditional formulation of the rule in Australia fuelled uncertainty about when the rule applied and disagreement about whether modifying the rule was a matter for the courts or the legislature.

2.29 The traditional formulation was reaffirmed in New South Wales by the Court of Appeal in *Troja v Troja*.³⁷ Mrs Troja had been convicted of the manslaughter of her husband. She argued that the forfeiture rule should not apply because her motive in killing her husband had not been to benefit from his estate and, in view of her moral culpability, it was not unconscionable for her to retain her entitlement under his will. The Chief Judge in Equity rejected these arguments in the initial civil proceeding. Mrs Troja appealed the decision.

2.30 The appeal was dismissed, although the decision was not unanimous. While President Kirby favoured the approach taken in *Public Trustee v Evans* and *Public Trustee v Fraser*,³⁸ Justice Mahoney noted that the traditional formulation of the rule was long established and had been affirmed and applied by superior courts. He did not consider it proper to limit it to cases of intentional wrong, nor to take into account the motive.³⁹ Justice Meagher reiterated that the rule is absolute and inflexible and he strongly criticised attempts to modify it.

31 [1992] 1 VR 583.

32 [1994] VSC 7993 (24 March 1994).

33 *Re Keitley* [1992] 1 VR 583, 584.

34 *Ibid* 588.

35 *Miliankos v Miliankos* [1993] VSC 7993 (24 March 1994), 1.

36 *Ibid* 11.

37 (1994) 33 NSWLR 269.

38 *Troja v Troja* (1994) 33 NSWLR 269, 283.

39 *Ibid* 299.

2.31 The Supreme Court of Victoria later also endorsed the strict application of the forfeiture rule and rejected the reasoning followed in *Re Keitley* and *Miliankos v Miliankos*. In *Estate of Soukup*, Justice Gillard traced the rule from *Fauntleroy's Case*. He noted that the High Court had held in *Helton v Allen*⁴⁰ that the forfeiture rule applied to manslaughter, and he agreed with the majority of the Court of Appeal in *Troja v Troja*.⁴¹ He added that:

I am not saying that public policy is an inflexible concept incapable of changing with the views of right thinking people of the time. But on an issue like the present it is not for an individual judge to seek to ascertain and set what he thinks public policy should be in this day and age. To recognise an exception to the forfeiture rule in the terms enunciated by Coldrey J is to deny the rule's existence.⁴²

The rule as it applies in Victoria

2.32 In *Estate of Soukup*,⁴³ Justice Gillard set out the common law rule of forfeiture as it applies in Victoria:

In my opinion, the law in this State in cases of succession to property pursuant to a will or on an intestacy and the forfeiture rule can be summarised as follows:-

- (1) It is a rule of public policy that no person can enforce a right directly resulting to the person as a result of that person's crime.
- (2) The rule applies to situations where a person seeks to enforce a right to property arising under a will or as a result of legislation providing for distribution on an intestacy.
- (3) That the rule applies in murder cases and manslaughter cases.
- (4) It does not apply in cases where the beneficiary is insane at the time of the commission of the crime.
- (5) In its application to manslaughter cases it does not depend upon moral culpability or any other factor.
- (6) Whilst the beneficiary is precluded from taking under the will or on an intestacy, nevertheless he or she may be able to establish a right to property pursuant to some other branch of the law and in circumstances where the person does not benefit from his or her crime.⁴⁴

2.33 Although this summation re-affirmed that the traditional formulation of the rule applies in this state, there remain questions about the scope, application and consequences of the rule. These are raised in Chapters 3 and 4.

2.34 Significantly, Justice Gillard drew attention to the unresolved concerns about the inflexibility of the rule. He noted that the application of the rule can cause injustice and he recommended that consideration be given to changing the law, as was achieved in the United Kingdom by the introduction of legislation discussed in the next section.

40 (1940) 63 CLR 691.

41 *Estate of Soukup* (1997) 97 A Crim R 103, 113.

42 *Ibid* 114.

43 (1997) 97 A Crim R 103.

44 *Ibid* 114–5.

Legislative responses

- 2.35 The United Kingdom, and later the Australian Capital Territory and New South Wales, responded to concern about the harsh effect of the forfeiture rule by giving courts a statutory power to modify the effect of the rule if the interests of justice demand it.
- 2.36 The UK Act, ACT Act and NSW Act leave the common law rule intact but provide that the court may modify the effect of the rule in exceptional circumstances.
- 2.37 In contrast, New Zealand has introduced legislation that replaces the common law rule. The NZ Act codifies the forfeiture rule and excludes from its operation killings caused by negligent acts or omissions, infanticide, suicide pacts and assisted suicides.⁴⁵

United Kingdom

- 2.38 Although the *Gray v Barr* test allowed English courts some capacity not to apply the forfeiture rule if the person was not guilty of deliberate, intentional and unlawful violence or threats of violence, it did not provide for relief against the rule when the act was intentional but the killer had acted with lessened culpability.
- 2.39 Concern about the inflexibility of the rule led to a Private Member's Bill being introduced to Parliament. The Bill was introduced to draw attention to the need for reform and its sponsors did not expect it to be passed. There was little debate or parliamentary awareness of its controversial nature.⁴⁶
- 2.40 The UK Act enables a court to provide relief from the forfeiture rule. A person to whom the rule applies because they have unlawfully killed another, or have unlawfully aided, abetted, counselled or procured the death of another, may apply for an order that modifies the effect of the rule.⁴⁷ However, the common law rule of forfeiture is still applied strictly to all persons convicted of murder.⁴⁸
- 2.41 The court may not modify the effect of the rule unless it is satisfied that:
- having regard to the conduct of the offender and the deceased and to such circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case.⁴⁹
- 2.42 The courts have modified the effect of the rule in a range of cases, including where the killer suffered from ongoing domestic violence and the killing formed part of the response to that violence;⁵⁰ and where there was a failed suicide pact.⁵¹
- 2.43 The legislation does not modify the rule itself, but it has been attributed with indirectly inhibiting any further judicial development of it. The passage of the legislation removed pressure on the courts to change the law, and has shifted focus from the scope of the rule to the effect of its operation.
- 2.44 The UK Act does not deal with the consequences of the application of the rule. However, in 2011, following recommendations of the Law Commission,⁵² the *Administration of Estates Act 1925* and the *Wills Act 1837* were amended so that, for the purposes of applying the rule to the distribution of the victim's estate, the killer is deemed to have died immediately before the victim.⁵³

45 *Succession (Homicide) Act 2007* (NZ) ss 4(1), 5(1).

46 S M Cretney, 'The Forfeiture Act, 1982: the Private Member's Bill as an Instrument of Law Reform' (1990) 10 *Oxford Journal of Legal Studies* 289–306.

47 *Forfeiture Act 1982* (UK) s 1(2).

48 *Ibid* s 5.

49 *Ibid* s 2(2).

50 *Re K Deceased* [1985] Ch 25; *Re K* [1086] Ch 180.

51 *Dunbar v Plant* [1997] 4 All ER 289.

52 Law Commission (England and Wales), *The Forfeiture Rule and the Law of Succession*, Cm 6625 (2005), 4.

53 *Estates of Deceased Persons (forfeiture rule and Law of Succession) Act 2011* (UK).

Australian Capital Territory

2.45 The ACT Act is closely based on the UK Act. It was introduced to ameliorate the harsh effects of the forfeiture rule where the killer has less moral culpability, particularly when the killing occurred in response to ongoing family violence.

2.46 When opening debate on the Bill in the Legislative Assembly, the Attorney-General, the Hon. Terry Connolly, said:

This Bill recognises ... that there are circumstances in which the rule can operate harshly. For example, there may be cases in family situations where a death occurs as a result of the actions of a battered spouse in instances of domestic violence. In circumstances of this kind the courts have not always produced consistent rulings, in part because of the constraints which have been imposed by the perceived wide ambit of the forfeiture rule. The Forfeiture Bill aims to remove the doubt surrounding this kind of case and to ensure that the question of moral culpability is one which can be fully taken into account by the courts when assessing a claim against the deceased's property.⁵⁴

2.47 There was little debate on the Bill, and no opposition to it. Since then, no cases of applications to modify the effect of the rule under this legislation have been placed on the public record. The Commission would welcome any comments on the operation of this legislation.

Question

1 What has been the effect of the *Forfeiture Act 1991 (ACT)* on the application and operation of the forfeiture rule in the Australian Capital Territory?

New South Wales

2.48 The Bill for the NSW Act was introduced into Parliament 18 months after the decision of the Court of Appeal in *Troja v Troja*. The purpose of the Bill was explained as being to provide relief from the strict application of the rule in relation to particular types of unlawful killings such as those occurring in the context of family violence;⁵⁵ assisted suicide;⁵⁶ suicide pacts;⁵⁷ and culpable driving.⁵⁸ The Attorney-General said that:

The proposed legislation recognises that there are varying degrees of moral culpability in unlawful killings, and legislation is necessary to give judges sufficient discretion to make orders in deserving cases in the interests of justice.⁵⁹

2.49 Although, like the ACT Act, the NSW Act was modelled on the UK Act, there were a number of refinements. Significantly, unlike the UK and ACT Acts, the NSW Act provides for any interested person to apply for the rule to be modified.⁶⁰ Not only the killer but the executor or administrator of the deceased estate, a person claiming through the killer, or any other person with a special interest may make an application.⁶¹

54 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 September 1991, 3526 (Terry Connolly, Attorney-General).
 55 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General). New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1995, 3481 (John Hannaford, Meredith Burgmann).
 56 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General). New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1995, 3481 (Meredith Burgmann). New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 December 1995, 4473 (Andrew Tink, Faye Lo Po).
 57 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General). New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1995, 3481 (Meredith Burgmann).
 58 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General). New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1995, 3481–2 (Meredith Burgmann).
 59 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General).
 60 *Forfeiture Act 1995 (NSW)* s 5(1).
 61 *Ibid* s 2.

- 2.50 In addition, unlike the ACT Act, the NSW Act specifies that the effect of the forfeiture rule may be modified in relation to joint tenancies. However, it does not provide what the effect of the rule is.⁶²
- 2.51 Following passage of the legislation, the effect of the forfeiture rule has been modified at the court's discretion in cases of diminished responsibility and culpable driving. By the time the NSW Act was reviewed in 2002, there had been only two reported decisions of the Supreme Court.⁶³ To date, fewer than 20 cases have been reported.

Exception for people with mental illness

- 2.52 In 2005 the NSW Act was amended⁶⁴ to 'prevent mentally ill murderers from profiting from their crime by applying the forfeiture rule'.⁶⁵
- 2.53 Following these amendments, if a person who has killed another is not subject to the forfeiture rule because they have been found not guilty by reason of mental illness, any interested person may make an application to the Supreme Court for an order that the rule apply as if the offender had been found guilty of murder.⁶⁶ The Court may make this order if it is satisfied that the justice of the case so requires, having regard to the conduct of the offender and the deceased, the effect of the application of the rule on the offender or any other person and such other matters as the Court considers material.⁶⁷
- 2.54 The Commission's terms of reference require it to consider the exception to the forfeiture rule for people who are not guilty because of mental impairment, and this is discussed in Chapter 3.

Codification of the rule

New Zealand

- 2.55 In 1997, the New Zealand Law Commission released a report on the forfeiture rule that recommended codifying the rule (referred to as 'homicidal heirs laws') in a single statute.⁶⁸ The NZ Act is based on the Law Commission's recommended draft legislation.
- 2.56 The NZ Act came into force on 17 November 2007.⁶⁹ As yet, there are no reported cases.
- 2.57 The Act serves as a codified forfeiture rule, replacing the relevant 'rules of law, equity and public policy'.⁷⁰ The Law Commission considered that a statute that codified the rule would be clearer and more workable than the discretion conferred on courts by the United Kingdom model.⁷¹ It also observed that:

the question whether a particular class of killing is sufficiently abhorrent to attract the application of the bar on profits is one of policy, rather than one of legal technique. For this reason it should be settled clearly and completely by Parliament.⁷²

62 Ibid s 6(2).

63 New South Wales, *Report on the Review of the Forfeiture Act 1995: New South Wales Attorney-General's Department*, Parl Paper No 72 (2002) 7. The cases were: *R v R* NSWSC 2143 (14 November 1997) and *Lenaghan-Britton v Taylor* [1998] NSWSC 218 (28 May 1998).

64 By Schedule 4 of the *Confiscation of Proceeds of Crime Amendment Act 2005* (NSW), which also amended the *Confiscation of Proceeds of Crime Act 1989* (NSW), the *Civil Liability Act 2002* (NSW), and the *Crimes Act 1900* (NSW).

65 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 September 2005, 18042 (Graham West).

66 *Forfeiture Act 1995* (NSW) s 11.

67 Ibid s 11(2)–(3).

68 Law Commission (New Zealand), *Succession Law: Homicidal Heirs*, Report No 38 (1997).

69 *Succession (Homicide) Act 2007* (NZ) s 2.

70 Ibid s 5(1).

71 Law Commission (New Zealand), above n 68, 5.

72 Ibid.

- 2.58 The legislation has been described as ‘technical’,⁷³ but it is aimed at reducing the difficulty of the work of trustees, the number of disputed estates and the negative impact on victims’ families.⁷⁴ According to a member of the New Zealand House of Representatives who spoke during the parliamentary debates on the Bill, the ‘general principle’ was to prevent killers profiting from their misdeeds but also ‘not to adversely penalise them’.⁷⁵
- 2.59 Unlike the common law rule as it applies in Victoria, where all unlawful killings are treated in the same way, the NZ Act provides exceptions for certain types of killings. Killings caused by a negligent act or omission, infanticide, killings in pursuance of a suicide pact, and assisted suicides are not included.⁷⁶

United States of America

- 2.60 In the United States, the rule established to prevent a killer from benefiting from their wrongdoing is called the ‘slayer rule’.⁷⁷ The rule reflects the moral principle of the sacredness of human life, the equitable principle of preventing unjust enrichment, and the legal principle that the slayer, as a third party, should not be permitted to interfere with the property of the victim.⁷⁸
- 2.61 The slayer rule is seen as having originated in *Riggs v Palmer*,⁷⁹ although the United States Supreme Court in the earlier case of *New York Mutual Life Insurance Co v Armstrong*⁸⁰ expounded a similar idea to the modern slayer rule.⁸¹
- 2.62 In *Troja v Troja*,⁸² President Kirby noted that the foundation for the slayer rule in the United States, established before the modern slayer statutes, is different to that in England and Australia.⁸³ The American courts have approached the slayer rule as an intervention by equity ‘to prevent an unconscionable acquisition of property’ after the will or intestacy statute has operated as normal, so that the killer takes legal title to the property but holds it on constructive trust for someone with a better claim in equity.⁸⁴
- 2.63 There has been disagreement as to whether or not the United States slayer rule has a retributive function.⁸⁵ It has also been argued that the rule is aimed at deterring people from committing homicide for economic reasons.⁸⁶ The slayer rule does not require that the killer forfeit any of their own property, including property irrevocably given to them by the victim before the killing.⁸⁷

73 New Zealand, *Parliamentary Debates*, House of Representatives, 8 May 2007, 8987 (Christopher Finlayson).

74 New Zealand, *Parliamentary Debates*, House of Representatives, 8 May 2007, 8988-9 (Lynne Pillay).

75 New Zealand, *Parliamentary Debates*, House of Representatives, 8 May 2007, 8994 (Charles Chauvel).

76 *Succession (Homicide) Act 2007* (NZ) s 4(1). Assisted suicide is also defined in s 4(1). Infanticide is as defined in *Crimes Act 1961* (NZ) s 178. Suicide pact is as defined in *Crimes Act 1961* (NZ) s 180(3).

77 John Tarrant, ‘Unlawful Killing of a Joint Tenant’ (2008) 15 *Australian Property Law Journal* 224, 224.

78 Karen J Sneddon, ‘Should Cain’s Children Inherit Abel’s Property?: Wading into the Extended Slayer Rule Quagmire’ (2007) 76 *University of Missouri at Kansas City Law Review* 101, 102.

79 22 NE 188 (NY, 1889).

80 117 US 591 (1886).

81 Karen J Sneddon, above n 78, 107.

82 (1994) 33 NSWLR 269.

83 *Ibid* 278–9 (President Kirby).

84 *Ibid* 279 (President Kirby); American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011), § 45 cmt (d).

85 Carla Spivack, ‘Let’s Get Serious: Spousal Abuse Should Bar Inheritance’ (2011) 90 *Oregon Law Review* 247, 269; American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (2003) § 8.4 cmt (a).

86 Callie Kramer, ‘Guilty by Association: Inadequacies in the Uniform Probate Code Slayer Statute’ (2003) 19 *New York Law School Journal of Human Rights* 697, 702.

87 American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (2003) § 8.4 cmt (o) illustration (11).

- 2.64 Every jurisdiction in the United States addresses the issue of a killer’s inheritance from their victim.⁸⁸ All states except New Hampshire use legislation, although the New York legislation deals only with joint bank accounts.⁸⁹ It has been argued that the ‘[l]egislatures have not moved boldly in this area’.⁹⁰ It is important to note that ‘[w]hile slayer statutes are plainly designed to codify the common law slayer rule’, the common law underpinnings of the rule are still relevant.⁹¹
- 2.65 The *Restatement (Third) of Restitution and Unjust Enrichment* (2011), (‘Restatement of Restitution’) § 45, and the *Restatement (Third) of Property: Wills and Other Donative Transfers* (2003), (‘Restatement of Property’) § 8.4, are ‘effectively codifications of American common law principles by groups of experts’.⁹² Both Restatements provide that, in a case of enrichment as a result of homicide that is not dealt with by statute in the relevant state, the slayer rule applies.⁹³ This is also the case where an issue is not dealt with in the Restatement of Property itself.⁹⁴
- 2.66 The approaches taken in New Zealand and the United States to codifying the rule provide alternative models for the Commission to consider if recommending legislative reform for Victoria. Options for legislative intervention in Victoria are discussed in Chapter 5.

88 Anne-Marie Rhodes, ‘Consequences of Heirs’ Misconduct: Moving from Rules to Discretion’ (2007) 33 *Ohio Northern University Law Review* 975, 979.

89 Ala Code § 43-8-253 (2013); Alaska Stat § 13.12.803 (2013); Ariz Rev Stat Ann § 14-2803 (2013); Ark Code Ann § 28-11-204 (2014); Cal Prob Code §§ 250–259 (LexisNexis 2014); Colo Rev Stat § 15-11-803 (2013); Conn Gen Stat § 45a-447 (2013); Del Code Ann § 2322 (2013); DC Code § 19-320 (2014); Fla Stat § 732.802 (2013); Ga Code Ann § 53-1-5 (2013); Haw Rev Stat § 560:2-803 (2013); Idaho Code Ann § 15-2-803 (2013); 755 Ill Comp Stat 5/2-6 (2013); Burns Ind Code Ann § 29-1-2-12.1 (2013); Iowa Code §§ 633.535–633.537 (2013); Kan Stat Ann § 59-513 (2012); Ky Rev Stat Ann § 381.280 (2013); La CC Arts 941–6 (2013); 18-A Me Rev Stat Ann § 2-803 (2013); Md Code Ann Estates and Trusts § 11-112 (2013); Mass Gen Laws ch 265, § 46 (2013); Mich Comp Laws § 700.2803 (2013); Minn Stat § 524.2-803 (2013); Miss Code Ann § 91-1-25 (2013); Mo Rev Stat § 461.054 (2013); Mont Code Ann 72-2-813 (2013); Neb Rev Stat § 30-2354 (2013); Nev Rev Stat Tit 3, Ch 41B (2013); NJ Stat Ann § 3B:7-1.1 (2013); NM Stat § 45-2-803 (2013); NY Estates, Powers and Trusts Law § 4-1.6 (LexisNexis 2013); NC Gen Stat §§ 31A-3–31A-12.1; ND Cent Code § 30.1-10-03 (2013); Ohio Rev Code Ann § 2105.19 (LexisNexis 2013); 84 Okla Stat § 231 (2013); Or Rev Stat § 112.455–112.555 (2012); 20 Pa Cons Stat §§ 8801–8815 (2013); RI Gen Laws §§ 33-1.1–33-1.1-16 (2013); SC Code Ann § 62-2-803 (2012); SD Codified Laws § 29A-2-803 (2013); Tenn Code Ann § 31-1-106 (2013); Tex. Estates Code § 201.058 (2013); Utah Code Ann § 75-2-803 (2013); 14 Vt Stat Ann § 322 (2013); Va Code Ann §§ 64.2-2500–64.2.2511 (2014); Wash Rev Code § 11.84.010–11.84.900 (2013); W Va Code § 42-4-2 (2013); Wis Stat § 852.01(2m), § 854.14 (2013); Wyo Stat Ann § 2-14-101 (2013).

90 Anne-Marie Rhodes, above n 88, 977.

91 Jeffrey G Sherman, ‘Mercy Killing and the Right to Inherit’ (1993) 61 *University of Cincinnati Law Review* 803, 849.

92 Melbourne University Law Review Association Inc., *Australian Guide to Legal Citation* (3rd ed, 2010) 276.

93 American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 45 cmt (b); American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (2003) § 8.4 cmt (i).

94 American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (2003) § 8.4 cmt (p).

Application of the forfeiture rule

18 Unlawful killings

24 Unlawful killers

31 Exception when not guilty because of mental impairment

3. Application of the forfeiture rule

Unlawful killings

- 3.1 The forfeiture rule applies to a person who unlawfully kills someone and stands to benefit as a result of their relationship with the victim.
- 3.2 An unlawful killing is a homicide that occurs in the absence of a valid defence. In Victoria, a valid defence is self-defence or duress.¹
- 3.3 The forfeiture rule applies to all unlawful killings involving deliberate and intentional violence or threats of violence.² In Victoria, it is uncertain whether the rule also applies to unlawful killings that result from an inadvertent, involuntary or negligent act.³

Unlawful killings in Victoria

- 3.4 Most unlawful killings in Victoria are carried out by someone known to the victim. According to the Australian Bureau of Statistics, 90 victims of homicide were recorded in Victoria in 2012. Of these, two out of three were killed by someone they knew. Thirteen were killed by their partner, and seven by a former partner.⁴
- 3.5 **Table 1** shows the relationship between homicide victims and offenders in Victoria during 2011 and 2012, which are the last two years for which figures are available.
- 3.6 **Table 1: Relationship of offender to homicide victim**

Relationship	2011	2012
Partner	9	13
Other family member	11	14
Ex-partner	3	7
Other non-family member	29	26
Stranger	21	10
Relationship not known	21	20
TOTAL	94	90

Source: Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, 2012*, Cat No 4510.0.

1 *Crimes Act 1958 (Vic)* ss 9AF, 9AG.

2 *Estate of Soukup* (1997) 97 A Crim R 103.

3 *Ibid.*

4 Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, 2012*, Cat No 4510.0.

- 3.7 The forfeiture rule is most likely to have applied where the victim was a family member.
- 3.8 Although the most recent figures released by Victoria Police are by financial year and are not directly comparable with those published by the Australian Bureau of Statistics, they provide greater detail about the range of homicide offences to which the forfeiture rule could apply. **Table 2** shows the homicide offences recorded by Victoria Police in 2011–12 and 2012–13.⁵

3.9 **Table 2: Homicide offences 2011–12 and 2012–13**

	2011–12	2012–13
Murder	87	94
Drive in dangerous manner causing death	22	30
Culpable driving causing death	36	25
Manslaughter	10	11
Accident—fail to stop—death	5	5
Drive at dangerous speed causing death	3	4
Accessory after the fact to murder	2	3
Accident—fail to assist—death	2	2
Aid and abet suicide	0	2
Survivor suicide pact	0	1
Accessory after the fact to manslaughter	0	1
TOTAL	167	178

Source: Victoria Police, *Crime Statistics 2012/13*, 12.

- 3.10 Of the 178 offences recorded in 2012–13, 40 were attempted, conspiracy or incitement offences.

Coverage by the forfeiture rule

- 3.11 A broad range of acts can cause the unlawful killing of another. As the forfeiture rule is applied inflexibly, a premeditated murder carried out with the intention of obtaining a financial benefit and a suicide pact in which one of the parties survived would both attract the application of the forfeiture rule.
- 3.12 This section describes the range of acts to which the rule applies, or may apply.

⁵ The figures refer to offences recorded on the Victoria Police Law Enforcement Assistance Program (LEAP) database, regardless of when the offence occurred or when it was reported to police.

Murder

- 3.13 The application of the forfeiture rule to murder is a well-established rule of public policy.⁶ Murder is the most serious of homicides and the maximum penalty in Victoria is life imprisonment.⁷ The killer has intentionally or recklessly and without lawful justification killed someone or has inflicted serious injury and their victim dies as a result. The community's abhorrence of this offence is clear. The Commission does not propose to open debate about whether the rule as it applies to convicted murderers should be modified in any way.

Manslaughter

- 3.14 An unlawful killing is manslaughter if, in the circumstances, the killer's culpability is less than that required to constitute murder. The range of acts and circumstances that this offence can encompass is reflected in the range of penalties: from 20 years imprisonment to a fine.⁸
- 3.15 Manslaughter is not confined to unlawful killings resulting from deliberate acts. A person may also be responsible for the death of another due to a failure to exercise a duty of care or because of their reckless or dangerous acts or omissions that a reasonable person would have foreseen might cause harm to another. This failure might be so egregious as to amount to manslaughter. Examples of cases in Victoria where negligence has been considered manslaughter include the accidental discharge of a firearm due to inattentive handling;⁹ neglect of children or other vulnerable relatives by failing to care for them through leaving them unattended in motor vehicles;¹⁰ or a failure to assist an injured person.¹¹
- 3.16 As discussed in Chapter 2, at common law, the forfeiture rule applies to manslaughter offences, at least where the offence was intentionally committed.¹² In the United Kingdom, the forfeiture rule does not apply in manslaughter cases resulting from an involuntary, inadvertent or negligent act, which can include motor manslaughter, inadvertent or involuntary manslaughter or negligent manslaughter.
- 3.17 The position in Victoria is not as clear. Justice Gillard expressed the view in *Estate of Soukup* that, while the court was not required to decide whether the forfeiture rule should apply to an inadvertent or involuntary act, the English approach would be appropriate in the circumstances.¹³ However, in the Australian Capital Territory and New South Wales the application of the rule in these circumstances may not need to be decided as, even if there is doubt, the court can use its discretion to modify the effect of the rule.
- 3.18 Courts in the United States have often held that a conviction for a crime less than murder does not necessarily mean that the killer will be precluded from inheriting from the victim.¹⁴ Under the Uniform Probate Code, in order to attract the slayer rule, the killing must be felonious and intentional.¹⁵ A killing is felonious and intentional if it is 'done with a mind bent on doing wrong'.¹⁶ To satisfy the 'intentional' requirement, the alleged killer must have 'acted with an intent to kill', which includes where they knew 'to a substantial certainty' that the killing would result from their conduct.¹⁷ The rule would not therefore

6 See *Cleaver v Mutual Reserve Fund Association* [1892] 1 QB 147; *In the Estate of Crippen* [1911] P 108; *Re Pollock* [1941] Ch 219; *Re Callaway* [1956] Ch 559.

7 *Crimes Act 1958* (Vic) s 3.

8 *Ibid* s 5.

9 *R v Sypott* [2003] VSC 327 (5 September 2003).

10 *The Queen v Nguyen* [2013] VSC 46 (12 February 2013); *R v Jie Hua Yu* [2001] VSC 207 (1 June 2001).

11 *The Queen v Blackwell* [2013] VSC 499 (13 September 2013).

12 *Helton v Allen* (1940) 63 CLR 691; *Estate of Soukup* (1997) 97 A Crim, R 103.

13 *Estate of Soukup* (1997) 97 A Crim R 103, 115.

14 Sara M Gregory, 'Paved with Good Intentions': The Latent Ambiguities in New Jersey's Slayer Statute' (2010) 62 *Rutgers Law Review* 821, 835; *In re Seipel* 329 NE 2d 419 (Ill App Ct, 1975); *Henry v Toney* 50 So 2d 921 (*Miss*, 1951).

15 UPC § 2-803(b) (2010).

16 *In re Estates of Swansons* 187 P 3d 631, 638 (Mont, 2008).

17 American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (2003) § 8.4 cmt (f).

be applied to cases of accidental manslaughter.¹⁸ However, courts have sometimes been prepared to apply the rule where it is not clear that the felonious and intentional requirement has been met.¹⁹

Deaths occurring because of negligent, reckless or dangerous acts or omissions

- 3.19 Other negligent, reckless or dangerous acts or omissions might result in alternative criminal charges such as culpable driving,²⁰ dangerous driving causing death,²¹ or failure to control a dangerous dog.²² Generally, deaths resulting from such acts or omissions are unintended.
- 3.20 Some common law jurisdictions apply the rule rigidly in these circumstances. In New South Wales, there are indications that the court is prepared to apply the forfeiture rule even where the relevant act of homicide was inadvertent. In *Straede v Eastwood*,²³ Mr Straede, who had pleaded guilty to dangerous driving causing death, applied to have the effect of the rule modified. His wife had been killed in a car accident when he was at the wheel and he had been sentenced to two years imprisonment. The question of whether or not the rule applied in his case was not in issue. Justice Palmer agreed to modify the effect of the rule, noting that there had been no suggestion that Mrs Straede's death was premeditated or that Mr Straede sought to profit from it.²⁴ However, due to the discretion under the NSW Act, the court did not need to consider whether the rule might not apply in the circumstances of the case once an application to modify the effect of the rule had been made.
- 3.21 Generally in the United States the slayer rule does not apply if the killing was reckless, accidental, or negligent.²⁵ However, both Kentucky and the District of Columbia preclude killers from inheriting from their victims when their negligent wrongful conduct results in homicide.²⁶ Also, there have been court decisions in Canada²⁷ and South Africa²⁸ that have held that the forfeiture rule will apply to someone who has negligently and unintentionally caused the death of another. In *Ontario Municipal Employees Retirement Board v Young*²⁹ a woman caused the death of her husband in a motor vehicle accident after drinking at dinner to celebrate their wedding anniversary. Her husband had a terminal illness and she did not intend to cause him harm but the court held that the forfeiture rule applied to both intentional and non-intentional killings.
- 3.22 The NZ Act excludes negligent acts and omissions from the operation of the forfeiture rule.³⁰ The New Zealand Law Commission recommended that they be excluded as a matter of policy. It reasoned that, in view of the unintended nature of the crime, allowing the unlawful killer to inherit is not likely to serve as an incentive for future such acts or omissions.³¹

18 UPC § 2-803 cmt (2010).

19 American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 45 reporter's note (b).

20 *Crimes Act 1958* (Vic) s 318.

21 *Ibid* s 319.

22 *Ibid* s 319B.

23 *Straede v Eastwood* [2003] NSWSC 280 (2 April 2003).

24 *Ibid* 45.

25 American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (2003) § 8.4 cmt (f), citing *Commercial Union Insurance Co. v Pelchat* 727 A 2d 676 (RI, 1999).

26 Ky Rev Stat Ann §§ 381.280, 507.050 (LexisNexis 2013); *Turner v Travelers Insurance Co* 487 A 2d 614 (DC, 1985)—involuntary manslaughter was sufficient for the killer to be disinherited.

27 *Ontario Municipal Employees Retirement Board v Young* (1985), 49 O.R. (2d) 78.

28 *Casey NO v The Master & others* 1992 (4) SA 505(N).

29 (1985), 49 O.R. (2d) 78.

30 *Succession (Homicide) Act 2007* (NZ) s 4(1).

31 Law Commission (New Zealand), *Succession Law: Homicidal Heirs*, Report No 38 (1997), 5.

Assisted suicides

- 3.23 While suicide is no longer a criminal offence,³² it is an offence in Victoria to incite another to commit suicide³³ or to aid or abet another in the commission of a suicide.³⁴ The consent of the victim is not a valid defence to assisting a suicide and the forfeiture rule will preclude the person who has assisted in the suicide from inheriting.
- 3.24 However, criminal penalties are often very different from those imposed for other offences that result in an unlawful killing. For example, in both *R v Hood*³⁵ and *R v Maxwell*³⁶ the court imposed wholly suspended sentences on offenders found guilty of assisting a suicide. In *R v Hood*, the deceased had expressed a wish to commit suicide to avoid ‘becoming a vegetable’ as a result of inoperable brain tumours; however, an autopsy revealed that the deceased had not had a brain tumour. The deceased, Mr Colley, had told multiple people he was going to commit suicide in order to die with dignity and organised a farewell party. Mr Hood was the deceased’s former partner who had continued to reside with him. He assisted Mr Colley to commit suicide by purchasing the drugs that he used to kill himself and remaining with him until he died. In *R v Maxwell*, Mr Maxwell had assisted his wife to commit suicide to relieve her suffering as a result of terminal cancer. The forfeiture rule would apply to prevent people in these circumstances from inheriting despite the minimal criminal culpability.
- 3.25 Assisting a suicide is a separate offence in New Zealand as well. In its review of the forfeiture rule, the New Zealand Law Commission considered that this offence does not warrant a bar to inheritance. The nature of an assisted suicide—in that it is the deceased’s choice to die—provides a clear distinction from murder.³⁷ Often, those who assist a suicide are close to the deceased and motivated by compassion to end their suffering. It is therefore likely that in these circumstances, rather than wishing to disinherit a beneficiary who helped them to commit suicide, a deceased person would most likely appreciate their assistance and perhaps even want to reward them.³⁸
- 3.26 The NZ Act, which codified and modified the forfeiture rule, expressly excludes assisted suicides from the operation of the rule.³⁹ The Act defines assisted suicide as follows:
- assisted suicide —
- (a) means the killing of a person by another person directly or indirectly if, immediately before death, the deceased asked the other person to help them to commit suicide; but
 - (b) does not include a killing where the deceased formed the wish to commit suicide, or resolved to commit suicide, or acted on that wish or resolve, as a consequence of any form of persuasion by the other person.⁴⁰

Suicide pacts

- 3.27 A suicide pact is entered into with the intention that none of the parties will survive. In Victoria it is an offence to incite another to commit suicide⁴¹ or to aid or abet another in the commission of a suicide.⁴² The survivor of a suicide pact who kills the deceased will be guilty of manslaughter.⁴³ The forfeiture rule is applied to preclude those who commit these offences in pursuit of a suicide pact from inheriting from another member of that pact.⁴⁴

32 *Crimes Act 1958* (Vic) s 6A.

33 *Ibid* s 6B(2)(a).

34 *Ibid* s 6B(2)(b).

35 [2002] VSC 123 (12 April 2002).

36 [2003] VSC 278 (24 July 2003).

37 Law Commission (New Zealand), above n 31, 6.

38 Jeffrey G Sherman, ‘Mercy Killing and the Right to Inherit’ (1993) 61 *University of Cincinnati Law Review* 803, 863.

39 *Succession (Homicide) Act 2007* (NZ) ss 3, 4(1). The codified rule prevents a person who commits homicide from benefiting from the victim’s death. The definition of ‘homicide’ for the purposes of the Act excludes an assisted suicide.

40 *Ibid* s 4(1).

41 *Crimes Act 1958* (Vic) s 6B(2)(a).

42 *Ibid* s 6B(2)(b).

43 *Ibid* s 6B(1).

44 *Dunbar v Plant* [1997] 4 All ER 289.

- 3.28 Suicide pacts often occur in circumstances of great distress for the parties involved. In *DPP v Rolfe*,⁴⁵ an 81-year-old man was convicted of manslaughter by suicide following an attempted joint suicide with his wife. His wife was going to be placed in an aged care home and they had wanted to avoid being separated. Both the husband and wife were found unconscious after attempting to gas themselves but only one of them was able to be saved. Mr Rolfe was later found to have been suffering severe psychiatric distress and depression at the time and received a non-custodial sentence.
- 3.29 The court in sentencing Mr Rolfe accepted that the proper function of sentencing was to deter people from the unlawful taking of life. The court also found that the principle of general deterrence was modified by Mr Rolfe's psychiatric condition of major depression.
- 3.30 As the forfeiture rule applies to suicide pacts, persons such as Mr Rolfe would be unable to inherit. They could lose the home they may have jointly owned with the other member of the suicide pact and, depending on their relationship with other heirs, they might forfeit other assets.
- 3.31 The NZ Act excludes suicide pacts from the operation of the codified rule.⁴⁶ In the United Kingdom, the effect of the rule was modified in *Dunbar v Plant*.⁴⁷ In that case, the trial judge held that the defendant, who had a suicide pact with her fiancé, had illegally aided and abetted his suicide and that the forfeiture rule therefore applied to preclude her from succeeding to his interests and entitlements. On appeal, the Court of Appeal held that at common law the rule remained absolute and inflexible. However, the Court exercised its statutory discretion under the UK Act to modify the effect of the forfeiture rule and allow the survivor to inherit.

Aiding and abetting

- 3.32 A person who aids, abets, counsels or procures another to commit an unlawful killing may be tried or indicted as a principal offender.⁴⁸ They will also be subject to the forfeiture rule, although this may be unclear to administrators and executors of estates. The United Kingdom, Australian Capital Territory and New South Wales have clarified this in their legislation.⁴⁹

Question

- 2 In Victoria, should the forfeiture rule be applied equally to all types of unlawful killing? If not:
- Which types of killing should be excluded from the operation of the rule?
 - On what basis should they be excluded?

45 [2008] VSC 528 (28 November 2008).

46 *Succession (Homicide) Act 2007* (NZ), ss 3, 4(1). The codified rule prevents a person who commits homicide from benefiting from the victim's death. The definition of 'homicide' for the purposes of the Act excludes 'a killing of a person by another in pursuance of a suicide pact'.

47 [1997] 4 All ER 289.

48 *Crimes Act 1958* (Vic) s 323.

49 *Forfeiture Act 1982* (UK) s 1(2); *Forfeiture Act 1991* (ACT) s 2; *Forfeiture Act 1995* (NSW) s 3.

Unlawful killers

- 3.33 Just as there is a broad range of unlawful killings, so there is also wide variation between unlawful killers in terms of their motivations, intentions and circumstances.
- 3.34 An act or omission causing the death of another can be accompanied by an intent to kill or to cause bodily harm on the part of the killer or by a reckless disregard of the consequences. A killer may also have murderous intent but there may be mitigating circumstances such as diminished responsibility or they may be motivated by compassion to end the suffering of the deceased through a mercy killing.
- 3.35 There may be a need to take variables of this type into account when applying the forfeiture rule.

Moral culpability

- 3.36 A killer's moral culpability means the degree of blameworthiness that can be attributed to their actions in committing the unlawful killing.
- 3.37 At common law the moral culpability of the killer has no effect on whether and how the forfeiture rule applies. As discussed in Chapter 2, there have been differing views on this issue. Strictly applying the rule where the level of moral culpability is low or in exceptional circumstances can create unjust results. Killers with lower moral culpability may be seen as being punished disproportionately harshly in comparison to unlawful killers who commit acts that generate a greater 'sense of outrage'.⁵⁰
- 3.38 For example, certain kinds of unlawful killings may be associated with lesser moral culpability on the part of the killer. These include killings that:
- occur in the context of ongoing family violence
 - involve some form of reduced responsibility
 - are unintentional or motivated by compassion or distress, as might occur in assisted suicides, suicide pacts and mercy killings
 - are perpetrated by minors.
- 3.39 The level of moral culpability of the killer is a significant issue in applying the slayer rule in the United States, where most jurisdictions do not apply the rule unless the killing is intentional.
- 3.40 Courts in the United Kingdom, Australian Capital Territory and New South Wales may have regard to the moral culpability of the killer when considering applications to modify the effect of the forfeiture rule under their statutory schemes. One of the reasons that the NSW Act was introduced was to recognise the variation in moral culpability that can occur in unlawful killings and give the court sufficient discretion to make orders in the interests of justice.⁵¹
- 3.41 Courts in these jurisdictions have decided to modify the forfeiture rule in a range of cases, including where the killer suffered from ongoing family violence and the killing formed part of the response to that violence;⁵² and in cases where the killer suffered from severely diminished responsibility.⁵³

50 H Zimmermann and J J Hockley, 'A Forfeiture Act for Western Australia?' (2009) 17 *Australian Property Law Journal* 35, 59.
51 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General).
52 *Re K Deceased* [1985] Ch 25; *Re K* [1986] Ch 180.
53 *Jans v Public Trustee* [2002] NSWSC 628.

Family violence

- 3.42 The law in Victoria recognises that unlawful killings which take place in the context of family violence may differ from other types of homicides. The *Crimes (Homicide) Act 2005* (Vic) provides for an alternative verdict to murder in Victoria to apply to these situations. While defensive homicide is currently under review by the Department of Justice, the original intention of the law combined with s 9AH *Crimes Act 1958* (Vic) recognises that homicides occurring in the context of ongoing family violence fall within a special category of homicides. Nevertheless, if a person kills their abuser in response to ongoing family violence where that response does not amount to self-defence, the forfeiture rule applies.⁵⁴
- 3.43 The Tasmanian Women’s Legal Service has expressed concern about the application of the forfeiture rule to women who kill violent partners. In its response to the Tasmania Law Institute’s issues paper on the forfeiture rule, the Women’s Legal Service pointed out that women who intend to kill a violent partner to escape their abuse are often found to have diminished responsibility.⁵⁵
- 3.44 In Victoria, women have been found guilty of the manslaughter of an abusive partner in cases where:
- A woman stabbed her partner in the course of a violent dispute, and received a wholly suspended sentence.⁵⁶
 - A woman disarmed her partner and then shot him as he moved toward her during a violent dispute, and received a five-year custodial sentence.⁵⁷
 - A woman experienced 50 years of domestic violence from her alcoholic partner and killed him in fear that he was about to attack her with an axe, and received a non-custodial sentence.⁵⁸
- 3.45 Where courts have a statutory power to modify the effect of the rule, they have done so in family violence cases. In the English case of *Re K Deceased* a woman accidentally killed the husband who assaulted her. The forfeiture rule was found to apply because she was guilty of a deliberate threat of violence and the death, although unintended, was the consequence of her conduct.⁵⁹ The court then exercised its statutory discretion to modify the effect of the rule.
- 3.46 The ACT Act and the NSW Act were introduced in order to ameliorate the harsh effects of the forfeiture rule in situations where the killer has less moral culpability for the unlawful killing, in particular when unlawful killings have occurred in response to ongoing family violence.⁶⁰ The Hon. Terry Connolly, Attorney-General, in the Second Reading speech said:

There have been enormous injustices where... a person who clearly has been a victim of enormous long-term domestic violence, has picked up a rifle that was aimed originally at them, taken a life, been convicted of manslaughter, and effectively lost the matrimonial home. That, clearly, is unjust, and this is, to that extent, a very significant reform.⁶¹

54 *Re K Deceased* [1985] Ch 25; *Re K* [1986] Ch 180.

55 Women’s Legal Service (Tas), Submission No 1 to Tasmania Law Reform Institute, *The Forfeiture Rule*, 2004, 1.

56 *R v Tran* [2005] VSC 220 (24 June 2005).

57 *R v Uttley* [2009] VSC 79 (16 March 2009).

58 *R v Gazdovic* [2002] VSC 588 (20 December 2002).

59 *Re K Deceased* [1985] Ch 25; *Re K* [1986] Ch 180.

60 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General). New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1995, 3481 (John Hannaford, Meredith Burgmann).

61 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 22 October 1991, 4109 (Terry Connolly, Attorney-General).

- 3.47 However, New Zealand did not provide an exception in the codified forfeiture rule for killings occurring in the context of family violence. The New Zealand Law Commission considered the issue when recommending legislative reform but concluded that self-defence is available as a complete defence to a homicide and someone who is experiencing family violence has no more right to kill than any other person in circumstances other than self-defence.⁶²

Reduced responsibility

- 3.48 That a killer was suffering from a substantial impairment or abnormality of mind is a partial defence to murder in New South Wales by reducing what would otherwise be murder to manslaughter,⁶³ although this defence is not available in Victoria. The killer's capacity to understand events, to judge whether their actions were right or wrong, or to control themselves at the time of the act or omission causing death, must have been substantially impaired by an abnormality of mind arising from an underlying condition so as to warrant their liability for murder to be reduced to manslaughter.⁶⁴ Prior to 1998, the partial defence of diminished responsibility, in which the abnormality of the mind could be transitory in nature, was available. Although this mental abnormality may reduce the degree of moral culpability, it does not affect the operation of the forfeiture rule.⁶⁵
- 3.49 In *Clift v Clift*,⁶⁶ an intellectually disabled woman suffering from a depressive illness and delusions murdered her aunt and then killed herself. Medical evidence showed that she knew what she was doing, and knew that it was wrong, even though her mental condition meant she was unable to refrain from killing her aunt. As the killer was found to be suffering from diminished responsibility rather than mental impairment, the forfeiture rule was applied.
- 3.50 The effect of the forfeiture rule has been modified by courts under the NSW Act in cases of diminished responsibility. For example, in *R v R*,⁶⁷ an application was successfully made on behalf of a 13-year-old boy who had killed his mother and sister and had diminished responsibility as a result of the physical, sexual and emotional abuse of his father. His application was supported by his half-brother and grandmother.
- 3.51 In *Leneghan-Britton v Taylor*,⁶⁸ the effect of the rule was modified where the killer had diminished responsibility due to an inability to cope with responsibilities as a carer for her grandmother but the killing was neither premeditated nor motivated by profit. However, the killer had also attempted to cover up the crime by misleading police and was sentenced to 11 years imprisonment, which suggests the offence was serious in scale.⁶⁹
- 3.52 The decision has been criticised as being a very liberal application of the court's discretionary power that did not justify the modification of the rule.⁷⁰ The court considered a range of factors of questionable relevance, including a lack of profit motive, which might exist in many murder cases, and the deceased's impending death from cancer.
- 3.53 Another crime in which the unlawful killer can experience some diminution of responsibility is infanticide. Infanticide is an alternative verdict for murder in Victoria and occurs when a woman causes the death of her child within two years of giving birth in circumstances that would otherwise constitute murder.⁷¹ In order to be guilty of the

62 Law Commission (New Zealand), above n 31, 8.

63 *Crimes Act 1900* (NSW) s 23A.

64 *Ibid* s 23A(1).

65 *Re Giles* [1972] Ch 544; *Jones v Roberts* [1995] 2 FLR 422; *Dalton v Latham* [2003] EWHC 796 (Ch); *Troja v Troja* (1994) 33 NSWLR 269.

66 (1964) 82 WN (NSW) 298.

67 NSWSC 2143 (14 November 1997).

68 (1998) 100 A Crim R 565.

69 Andrew Hemming 'Killing the Goose and Keeping the Golden Nest Egg' (2008) 8 *Queensland University of Technology Law & Justice Journal* 342, 356.

70 Nicola Peart, 'Reforming the forfeiture rule: Comparing New Zealand, England and Australia' (2002) 31 *Common Law World Review* 1, 27.

71 *Crimes Act 1958* (Vic) s 6.

offence of infanticide the killer must be disturbed because of a failure to recover from the effect of giving birth or must suffer a disorder consequent to giving birth.⁷² The forfeiture rule would apply to preclude women who have committed infanticide from inheriting any property held on trust for the deceased infant.

- 3.54 The forfeiture rule is not applied in cases of infanticide under the NZ Act.⁷³ The New Zealand Law Commission considered infanticide to be sufficiently analogous to an acquittal on the ground of insanity.⁷⁴
- 3.55 However, if, as the New Zealand Law Commission suggests, infanticide is analogous to a killing in which there is an acquittal on the ground of mental impairment, then other types of unlawful killings involving a diminution in the killer's responsibility may also be analogous to this crime. There may therefore be a broader range of circumstances in which an unlawful killing might occur that are equally worthy of exception from the operation of the forfeiture rule.

Age

- 3.56 Minors are subject to the forfeiture rule, and so those who kill cannot inherit from their victims.⁷⁵ However, minors are not regarded as having the same level of criminal responsibility or culpability as adult offenders in the criminal justice system.
- 3.57 Children in Victoria are subject to the special protections of the *Children, Youth and Families Act 2005* (Vic). The general principles that underpin this legislative scheme include:
- The best interests of the child must always be paramount.⁷⁶
 - The need to protect a child from harm, to protect their rights and promote their development must always be considered.⁷⁷
 - Consideration must be given to the effects of cumulative patterns of harm on a child's development.⁷⁸
- 3.58 The application of the forfeiture rule to minors could be regarded as inconsistent with these principles and policies, particularly in the younger age range of minors.
- 3.59 In *R v R*,⁷⁹ the court modified the effect of the forfeiture rule on the basis of the diminished responsibility of the killer. However, the case involved a 13-year-old boy who killed his mother and sister while in a state of diminished responsibility resulting from physical, sexual and emotional abuse by his father. The ability of the minor R to process and deal with his situation is likely to have been affected by his age. Children in these circumstances could not ordinarily be held to have the same level of responsibility as an adult. Any application of the forfeiture rule to a child such as R might deprive the child of an inheritance that could be used to provide them with the assistance and care they require to develop and overcome the cumulative effects of the harm they may have suffered.
- 3.60 Minors are nevertheless still held responsible for their crimes and many minors who commit unlawful killings are aware that what they are doing is wrong. A minor could kill with the objective of obtaining a financial benefit if the forfeiture rule did not apply to all minors who commit unlawful killings.

72

Ibid.

73 *Succession (Homicide) Act 2007* (NZ) s 4(1).

74 Law Commission (New Zealand), above n 31, 10.

75 See *Re Fitter; Public Trustee v Fitter* [2005] NSWSC 1188.

76 *Children, Youth and Families Act 2005* (Vic) s 10(1).

77 Ibid s 10(2).

78 Ibid s 10(3)(e).

79 NSWSC 2143 (14 November 1997).

Motivation

- 3.61 Not all unlawful killings result from an act of violence or reckless disregard for the safety of others. Some, such as assisted suicides or mercy killings, are motivated by compassion and love for the victim and to relieve their suffering. The application of the forfeiture rule in these cases can sometimes produce harsh results.
- 3.62 A mercy killing can be distinguished from assisted suicide in that the killer takes a more direct role in the killing. In *Re Dellow's Will Trusts*,⁸⁰ the killer suffered from depression as a result of her husband's helplessness following a number of strokes. She had turned on the gas taps on the kitchen stove and remained in the kitchen with her husband until they both died. The court found she had unlawfully killed her husband and was not entitled to his estate, but said:
- It is in these circumstances that I find it somewhat repellent to have to hold that the wife was guilty of a crime which ranks amongst the most serious that can possibly be committed. The law in its concern for the protection of human life must be strong and, indeed, severe, but I cannot refrain from saying that, in its bearing on such a case as this, it is clumsy, crude and indeed, nowadays, if the case is regarded sympathetically, somewhat uncivilised... This is clearly a case for compassion rather than condemnation.⁸¹
- 3.63 Criminal prosecutions of mercy killings are rare, although people have been prosecuted in Victoria. In *R v Klinkermann*, an elderly man was convicted of attempting to kill his wife, who had a significant disability and was dying, although no longer able to communicate that she wanted to end her life. Justice King referred to the issue of euthanasia and commented that the law protects human life and places it into a special category. It is protected at all costs.⁸²
- 3.64 In Wisconsin, if a victim's will expressly says that the slayer rule does not apply, then the killer will be able to inherit.⁸³ This law may have been intended to enable will-makers to provide for beneficiaries who have participated in a mercy killing with their consent and knowledge.⁸⁴
- 3.65 However, the motivation of a mercy killer is often difficult to prove, as is the consent of the victim. An exception for mercy killing might enable unlawful killers to use this as an excuse for their crime in order to retain property or succession entitlements. Mercy killing is not an exception to the forfeiture rule under the NZ Act, because the motive of ending the victim's suffering is not a justification for murder or manslaughter under the New Zealand criminal law, and because of the importance of protecting human life.⁸⁵ In the parliamentary debates on the Bill, concern was expressed that there would be cases involving mercy killings that did not amount to assisted suicide, and would thus inappropriately attract the forfeiture rule.⁸⁶

Other factors to consider

- 3.66 A range of other factors might be considered relevant to the question of whether an unlawful killer should be able to inherit from their victim. These might include the forgiveness of the deceased; the impact of the loss of inheritance on the killer; or whether the killer was found to be criminally responsible.

80 [1964] 1 WLR 451.

81 *Ibid* 455.

82 *R v Klinkermann* [2013] VSC 65.

83 Wis Stat § 854.14(6)(b) (2013); Anne-Marie Rhodes, 'Consequences of Heirs' Misconduct: Moving from Rules to Discretion' (2007) 33 *Ohio Northern University Law Review* 975, 981.

84 Anne-Marie Rhodes, 'Consequences of Heirs' Misconduct: Moving from Rules to Discretion' (2007) 33 *Ohio Northern University Law Review* 975, 981.

85 Law Commission (New Zealand), above n 31, 7.

86 New Zealand, *Parliamentary Debates*, House of Representatives, 8 May 2007, 8988 (Lynne Pillay), 8990 (Kate Wilkinson).

Forgiveness by victim

3.67 In some circumstances the victim might not have wanted the killer to be disinherited. It is unclear whether the forfeiture rule applies if a person who is fatally injured makes a will after the attack that causes their death, knowingly granting a benefit to the killer.⁸⁷ The single authority supporting the proposition that a killer may be forgiven by their victim in order to inherit was expressed as part of a minority judgment in Canada.⁸⁸ In *Lundy v Lundy*⁸⁹ a man who was his wife's beneficiary under her will was convicted of her manslaughter and had transferred ownership of the property to his brother. The court held that the killer was not able to inherit as a result of the forfeiture rule. There was no evidence of the existence of any interval between wounding and death in which forgiveness may have occurred,⁹⁰ although Justice Taschereau in his minority judgment stated that:

[I]t cannot be denied, I presume, that a will by any one in favour of the person who killed them is good, if made in the interval between the wound and death.⁹¹

3.68 The French and Louisiana Civil Codes provide that persons convicted of attempting to kill the will-maker are presumed to be unworthy heirs who will be precluded from inheriting—except if the deceased, in full knowledge of these facts, expresses their intent in the form of a will for that person to inherit.⁹² The French Civil Code also provides that a person convicted of killing the will-maker may be forgiven.⁹³

3.69 Giving effect to testamentary intent is a fundamental principle of succession law; however, there are many issues with proof of testamentary intent in these circumstances. The New Zealand Law Commission did not recommend an exclusion for these circumstances, as it is always open to substituted beneficiaries to restore to the killer property to which he or she would otherwise have been entitled and these cases appear too rare to merit an exclusion provision.⁹⁴

Impact on the killer

3.70 The loss of property entitlements may have a particularly negative impact on certain unlawful killers. In *Jans v Public Trustee*,⁹⁵ the court decided to modify the effect of the forfeiture rule under the NSW Act. The court took into account the fact that the killer, who was deemed to have diminished responsibility at the time of the killing, would have nowhere to live if he were disinherited. The application was supported by family members.

Killer not convicted

3.71 The forfeiture rule may be applied to a person who has been acquitted in criminal proceedings, or has not been prosecuted at all, if it is proved to the court, on the balance of probabilities, that the person unlawfully killed the deceased.⁹⁶ Proceedings on the right of someone to inherit or take the benefit of property entitlements in circumstances where the forfeiture rule would apply are not about punishing a killer for their crime but about enforcing a rule of public policy that a person should not benefit from their crime. These proceedings will therefore not violate the rule against double jeopardy, which prevents an accused from being retried for the same crime without compelling new evidence.

87 G E Dal Pont and K F Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) 172.
 88 Andrew Simester, 'Unworthy But Forgiven Heirs' (1990) 10 *Estates & Trust Journal* 217, 220; *Lundy v Lundy* (1895) 24 SCR 650.
 89 *Ibid* 650.
 90 *Ibid* 654.
 91 *Ibid* 653.
 92 *Code Civil (Civil Code)* (France) arts 726, 728; La CC art 943 (2013); Anne-Marie Rhodes, above n 83, 980.
 93 *Code Civil (Civil Code)* (France) arts 726, 728.
 94 Law Commission (New Zealand), above n 31, 10.
 95 [2002] NSWSC 628.
 96 *Helton v Allen* (1940) 63 CLR 691.

- 3.72 There are many circumstances in which it may be just to apply the forfeiture rule to a person who has not been convicted of the offence. The Tasmania Law Reform Institute observed that it could be just to apply the forfeiture rule where a killer has not been prosecuted because they also died or because crucial evidence was not admissible in the criminal trial.⁹⁷
- 3.73 However, the application of the forfeiture rule to a person who has been acquitted of the offence is inconsistent with other legislation in Victoria. Under the *Confiscation Act 1997* (Vic) an application may be made to confiscate property that was derived as a result of a homicide offence where the killer has been convicted,⁹⁸ or deemed to have been convicted.⁹⁹
- 3.74 The application of the forfeiture rule to a person who has been acquitted may be contrasted with the exception for persons found not guilty by reason of mental impairment. If the reason for that exception is that the person is not criminally responsible for a killing, then that reasoning could also extend to persons acquitted of an offence.

Indirect benefit to the killer

- 3.75 In some circumstances it is possible that an unlawful killer can obtain a benefit by inheriting from the heir of their victim. For example, in a recent American case the wife of a man who killed a will-maker inherited from the estate of the victim despite suggestions that she had prior knowledge of the crime.¹⁰⁰ In the much criticised case of *Ex parte Steenkamp and Steenkamp*¹⁰¹ in South Africa, a couple left a will benefitting their daughter and her children. They were subsequently killed by their son-in-law, and later one of their grandchildren who had received a benefit under the will died in infancy. The court held that the killer was eligible to inherit from his child.
- 3.76 However, in Oregon an unlawful killer is not only precluded from inheriting from their victim, but also from an heir of their victim unless that heir specifically includes the killer in a will or other instrument executed after the victim's death.¹⁰²

Question

- 3 Should the forfeiture rule apply equally to all unlawful killers? If not:
- (a) Should the courts be able to consider moral culpability?
 - (b) What other factors should be taken into account?

97 Tasmania Law Reform Institute, *The Forfeiture Rule*, Report No 6 (2004) 21.

98 *Confiscation Act 1997* (Vic) s 32(1).

99 *Ibid* ss 4, 5.

100 Dan Christensen, 'Killer's wife set to inherit victim's money; "a travesty," Broward prosecutor says,' *Broward Bulldog* (online), Broward, Florida, 21 May 2013 <<http://www.browardbulldog.org/2013/05/killers-wife-set-to-inherit-victims-money-a-travesty-broward-prosecutor-says>>.

101 1952 (1) SA 744.

102 Or Rev Stat § 112.465(2) (2012); Carla Spivack, 'Let's Get Serious: Spousal Abuse Should Bar Inheritance' (2011) 90 *Oregon Law Review* 247, 274.

Exception when not guilty because of mental impairment

- 3.77 In most jurisdictions, the common law forfeiture rule does not apply to people who are found to be not guilty of an unlawful killing due to mental impairment.¹⁰³ This is consistent with other Victorian legislation including the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) and the *Confiscation Act 1997* (Vic).¹⁰⁴
- 3.78 In New South Wales an interested person can apply to the Supreme Court for an order that the forfeiture rule apply to someone who has been found not guilty by reason of mental illness as if they were found guilty of murder.¹⁰⁵

Reasons for the exception

- 3.79 The exception is a generally accepted principle that safeguards the rights of persons with a mental impairment. The court in *Re Plaister*¹⁰⁶ inferred that an unlawful killer who committed murder-suicide, killing his wife and daughter and then himself, had a mental illness. The court found that public policy did not require that the forfeiture rule be applied to prevent the killer from inheriting in these circumstances.¹⁰⁷
- 3.80 Whether a person who has been found not guilty of homicide because of their mental impairment committed the act is not in issue. However, because of their impairment they did not form the necessary mental intent that needs to be proved in order for them to be held criminally responsible for committing the offence. They did not have the capacity to commit the offence and are not morally culpable for their actions.¹⁰⁸
- 3.81 Exempting persons found not guilty of an unlawful killing by reason of their mental impairment ensures that they will not be held accountable for actions for which they are not responsible.
- 3.82 However, this exception may be inconsistent with the absolute and inflexible nature of the forfeiture rule in other circumstances in which the killer is not criminally responsible or where the killing was unintentional.¹⁰⁹ Where the rule is applied strictly, the courts do not examine the motive of the killer and instead rely on the fact of the killing to apply the forfeiture rule.
- 3.83 It could be seen as anomalous that a person who is found not guilty in a criminal trial may have the rule applied against them, unless they were not guilty because of mental impairment.¹¹⁰ On the other hand, a person who has been acquitted on the criminal standard of proof—beyond reasonable doubt—may nevertheless be found in civil proceedings on the balance of probabilities to have committed the homicide. If so, the forfeiture rule should prevent any benefits flowing to the killer as a result. A person who is acquitted because of mental impairment has committed the homicide but, based on the M’Naghten rules discussed below, has been determined to have been not responsible.

103 *In the Estate of Hall* [1914] P 1; *Re Houghton* [1915] 2 Ch 173; *Re Plaister*; *Perpetual Trustee Company v Crawshaw* (1934) 34 SR (NSW) 547.
 104 *Confiscation Act 1997* ss 4, 32(1); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) generally.
 105 *Forfeiture Act 1995* (NSW) s 11(1).
 106 (1934) 34 SR (NSW) 547.
 107 *Ibid*; *Perpetual Trustee Company v Crawshaw* (1934) 34 SR (NSW) 547, 549.
 108 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Consultation Paper No 17 (2013), 10–11.
 109 Chris Triggs, ‘Against Policy: Homicide and Succession to Property’ (2005) 68 *Saskatchewan Law Review* 117, 126.
 110 *Ibid* 127.

Mental impairment in Victoria

- 3.84 In a 2010 study on persons found not guilty by reason of mental impairment, almost half (42.5 per cent) of the offences committed by the 146 participants were committed against an immediate family member, with 16.5 per cent of the victims being a person's spouse or partner.¹¹¹ Under the current law, the forfeiture rule would not preclude any of them from inheriting.
- 3.85 An analysis of the socio-demographic, psychiatric and criminological characteristics of the 146 participants of the study suggests the typical person found not guilty by reason of mental impairment is unemployed, unskilled and has not completed secondary schooling.¹¹² Many people with mental impairment will be likely to have ongoing care needs. If the forfeiture rule were to be applied to them, they may be more likely to require state support to meet these needs.

Requirements of mental impairment

- 3.86 The requirements of proving mental impairment in Victoria are onerous and it is unlikely to be an incentive for people to commit an unlawful killing. While it is open to the court to infer that a perpetrator must have been mentally ill,¹¹³ it is difficult in practice to prove that a person has a mental impairment.¹¹⁴
- 3.87 The CMIA replaced the common law defence of insanity and deals with the process and test for determining whether an accused person is not guilty of an offence because of mental impairment, which includes mental illness. Where an unlawful killer's impairment at the time of the unlawful killing affects their capacity to commit the offence, they may be exempted from the usual criminal process and diverted to a specialised process.¹¹⁵ This exemption from the criminal process is founded on the principle that a person should not be held criminally responsible and punished for an offence if at the time the offence occurred they did not have the capacity to commit the offence and were not morally blameworthy for their actions because of a mental impairment.¹¹⁶
- 3.88 The CMIA seeks to achieve a therapeutic aim by promoting an increased understanding and tolerance of mental illness that can give rise to a mental impairment.¹¹⁷ Exempting persons found not guilty of an unlawful killing from the forfeiture rule is consistent with this aim.
- 3.89 However, mental impairment is difficult to demonstrate and applies only to a specific class of offenders. The CMIA has adopted the common law test for establishing the defence of mental impairment, known as the M'Naghten Rules. In order to establish the defence it must be proven that at the time of committing the causative act they were labouring under such a defect of reason from disease of the mind as to not know the nature and quality of the act they were doing, or if they did know, then they must not have known that the act was wrong.¹¹⁸ Therefore, where an unlawful killer is conscious that an act is one they should not be doing, then despite any mental condition they might be suffering, they will be held criminally responsible and will be subject to the application of the forfeiture rule.

111 Janet Ruffles, *The Management of Forensic Patients in Victoria: The More Things Change, The More They Remain the Same* (PhD Thesis, Monash University, 2010) 122.

112 Ibid 160.

113 *Re Pitts* [1931] 1 Ch 546.

114 See *Clift v Clift* (1964) [1964-5] NSWLR 1896.

115 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* s 20.

116 Victorian Law Reform Commission, above n 108, 10–11.

117 *Re LN (No 2)* [2000] VSC 159R (19 April 2000).

118 *R v M'Naghten* (1843) 8 ER 718.

- 3.90 For example, in *Clift v Clift*,¹¹⁹ an intellectually disabled woman suffering from a depressive illness and delusions murdered her aunt and then killed herself. Medical evidence showed that she knew what she was doing, and knew that it was wrong, even though her mental condition was such that she was unable to refrain from killing her aunt, and the forfeiture rule applied.
- 3.91 In addition to being difficult to demonstrate, a finding of not guilty by reason of mental impairment has serious consequences and is not treated lightly by the courts. The supervision process under the CMIA can be onerous and last for a significant period. The length of a supervision order is always indefinite and can last the rest of a person's life. It involves continual assessment and review of the person's progress under the order. The length of time that people are ultimately detained can vary and research has shown that detention under the CMIA in Victoria has ranged from three months to 36 years.¹²⁰

New South Wales reforms

- 3.92 In 2005 the NSW Act was amended by Schedule 4 of the *Confiscation of Proceeds of Crime Amendment Act 2005* (NSW), which also amended the *Confiscation of Proceeds of Crime Act 1989* (NSW), the *Civil Liability Act 2002* (NSW), and the *Crimes Act 1900* (NSW). These amendments were intended to:
- improve the processes involved in confiscating criminal assets, broaden the scope of existing laws, make prosecutions easier, create new offences of money laundering, prevent mentally ill offenders from misusing civil damages paid to them, and prevent mentally ill murderers from profiting from their crime by applying the forfeiture rule.¹²¹
- 3.93 At the time, the reforms were contentious and were opposed strongly within Parliament and by organisations such as the Council for Civil Liberties and the International Commission of Jurists.¹²² The Legislation Review Committee formed the view that 'treating a person who has been found not guilty of a crime as if they had been convicted of that crime is a trespass on their fundamental rights'.¹²³
- 3.94 In *Re Fitter; Public Trustee v Fitter*,¹²⁴ a woman was murdered by her husband and two children, one of whom was a minor. The husband and son were found to have paranoid schizophrenia and the daughter was found to be suffering a psychotic episode. All participated in the murder, believing that the victim was trying to harm them in some way, and were found not guilty by reason of mental illness. The court used its power under section 11(3) of the NSW Act to apply the forfeiture rule against them after the court considered their conduct in the circumstances. The court was particularly influenced by a lack of remorse for the killing and the absence of blameworthy conduct of the deceased prior to her murder. Other factors the courts have taken into consideration when deciding to apply the forfeiture rule upon an application under section 11(3) of the NSW Act include a prior history of violent behaviour.¹²⁵

119 (1964) 82 WN (NSW) 298.

120 Victorian Law Reform Commission, above n 108, 49.

121 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 September 2005, 18042 (Graham West).

122 New South Wales, *Parliamentary Debates*, Legislative Council, 18 October 2005, 18648–9 (Arthur Chesterfield-Evans).

123 Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest*, No 11 of 2005, 10 October 2005, 14.

124 [2005] NSWSC 1188.

125 *Guler v NSW Trustee and Guardian* [2012] NSWSC 1369.

Other jurisdictions

- 3.95 Most common law jurisdictions also allow for the exception of persons found not guilty by reason of mental impairment.¹²⁶ However, while courts in the United States also generally allow a killer to inherit from their victim in these circumstances,¹²⁷ whether there should be a mental impairment exception to the slayer rule is still a live issue in a number of jurisdictions there.¹²⁸ In a number of cases where the killer was not prosecuted, or was acquitted by reason of insanity, the courts have nonetheless held that the killer was barred from inheriting from their victim.¹²⁹ In Ohio, legislation prohibits accused killers found not guilty by reason of insanity from gaining from the deceased's estate;¹³⁰ however, they can file a complaint in probate court to declare their right to benefit from the death.¹³¹
- 3.96 In Indiana, a person is automatically made a constructive trustee of property that they receive as a result of their victim's death if they are found 'guilty but mentally ill' of murder, causing suicide or voluntary manslaughter.¹³² If the alleged slayer has been found 'not responsible because of insanity at the time of the crime', another person can launch a civil action to have the former declared a constructive trustee of the property.¹³³ This will be declared by the court if 'by a preponderance of the evidence it is determined that the person killed or caused the suicide of the individual'.¹³⁴

Question

- 4 Should the absolute exception to the forfeiture rule for persons found not guilty by reason of mental impairment be retained? If not:
- (a) In what circumstances should the exception not apply?
 - (b) Should the court have a discretion to apply the rule in the circumstances of the case?

126 *Re Pitts* [1931] 1 Ch 546; *Re Plaister*; *Perpetual Trustee Company v Crawshaw* [1934] NSWStRp 18; (1934) 34 SR (NSW) 547; *Dhingra v Dhingra* 2012 ONCA 261.

127 Laurel Sevier, 'Kooky Collects: How the Conflict between Law and Psychiatry Grants Inheritance Rights to California's Mentally Ill Slayers' (2007) 47 *Santa Clara Law Review* 379, 380, 395; e.g. *Estate of Ladd* 153 Cal Rptr 888 (Ct App, 1979); *Ford v Ford* 512 A 2d 389, 399 (Md, 1986). However, the Surrogate's Court of New York has held that a mother who killed her children and was found not guilty by reason of mental disease was barred from inheriting the money that the children's estates received as a result of a wrongful death claim: *In re Demesyieux* 978 NYS 2d 608 (NY Sur Ct, 2013).

128 Sara M Gregory, 'Paved with Good "Intentions": The Latent Ambiguities in New Jersey's Slayer Statute' (2010) 62 *Rutgers Law Review* 821, 840.

129 *Congleton v Sansom* 664 So 2d 276 (Fla Dist Ct App, 1995); *Goldsmith v Pearce* 75 NW 2d 810 (Mich, 1956); *Garner v Phillips* 47 SE 2d 845 (NC, 1948).

130 Ohio Rev Code Ann § 2105.19(A) (LexisNexis 2013).

131 *Ibid* 19(C).

132 Burns Ind Code Ann § 29-1-2-12.1(a) (2013).

133 *Ibid* § 29-1-2-12.1(b) (2013). They will be a constructive trustee of the property for the benefit of those who would be legally entitled to the property if the slayer had predeceased the victim: *ibid* § 29-1-2-12.1(c) (2013).

134 *Ibid* § 29-1-2-12.1(b) (2013).

Consequences of the forfeiture rule

- 36** When the deceased has a will
- 41** When the deceased dies intestate
- 43** When the deceased and their killer are joint tenants
- 46** When the deceased has an entitlement to property
- 47** Other property of the deceased
- 48** Family provision applications

4. Consequences of the forfeiture rule

- 4.1 Once the forfeiture rule has been applied, the courts must determine how to dispose of the benefits that the killer would have otherwise been entitled to receive upon the death of the victim. These may include inheritance or property rights transmitted to the killer from the deceased by will, intestacy or survivorship as well as from the victim's superannuation fund or insurance policy. The killer's entitlement to claim for family provision, or a pension, will also be forfeited.
- 4.2 There has been a variety of responses by the courts to this issue. These decisions have had consequences for the killer, the victim's estate, and innocent third parties with an interest in the deceased's property as well as those persons whose interest in the deceased estate derives from the person carrying out the killing.

When the deceased has a will

- 4.3 If the deceased person has left a will, it will set out how they wish their 'estate' to be distributed. An estate includes the property that the person held, or was entitled to hold, at the time of their death. It may be real property¹ or personal property.²
- 4.4 The following property interests are not normally included in the estate:
- Death benefits payable by a superannuation fund, as they will usually be disposed of only by a trustee of the fund. However, fund members often make a binding death benefit nomination asking the trustee to pay their superannuation death benefit to the person they appoint as executor under their will. When this happens, the executor can then distribute the money as directed by the fund member's will.³ The trustee of a superannuation fund, in the exercise of its discretion, may also decide to pay the superannuation benefits to the estate of the member. The forfeiture rule would then apply to these funds in the same way as the rest of the estate.
 - Payment under a life insurance policy to someone nominated by the insured person. The payment is made in accordance with the agreement between the insurance firm and the insured person.
 - Jointly owned property, such as a house or a bank account, because this passes directly to the other owners.

1 An ownership of or interest in land, together with a house or another type of building or immovable object attached to the land. For a full description of the type of property that may be disposed of by will, see the *Wills Act 1997* (Vic) s 4.

2 Other assets, such as money, shares, vehicles and other movable personal possessions. For a full description of the type of property that may be disposed of by will, see the *Wills Act 1997* (Vic) s 4.

3 *Superannuation Industry Supervision Act 1993* (Cth) s 59(1A).

- 4.5 The will-maker can leave gifts to chosen beneficiaries and then leave the estate that remains after debts are paid—the residuary estate—to be divided among other beneficiaries. They can also simply divide the entire estate among named beneficiaries.

Residuary beneficiaries

- 4.6 The forfeiture rule prevents an unlawful killer named in a will as a beneficiary of the residue of an estate from taking a benefit. The estate is distributed to the other beneficiaries or, if the unlawful killer is the sole beneficiary of the residue, the estate will be distributed to the deceased person's next of kin in accordance with intestacy law, as if there were no will.⁴

Gifts

- 4.7 Gifts to the killer in a will return to the residue of the estate for distribution to the residuary beneficiaries.⁵ If there is no residue then the gift will be distributed as on intestacy and the unlawful killer will be precluded from taking any benefit.⁶

Class gifts

- 4.8 An unlawful killer may be a member of a class of persons to whom the victim left a gift in their will. For example, the will could direct that the title of the family home should be transferred to 'all my grandchildren' as tenants in common in equal shares. If the killer is a grandchild, they forfeit their entitlement to an interest in that gift.⁷ Other members of the class will consequently take a greater share.

Contingent gifts over

- 4.9 Some wills include provisions for a gift over to an alternative beneficiary upon a contingent event. For example, a will might provide that an alternative beneficiary will inherit in the event that the original beneficiary (the killer) predeceases the will-maker. However, the killer is still alive, although unable to inherit due to the forfeiture rule. The courts in Australia have taken a variety of approaches to the issue of how to distribute assets that are subject to a gift over. The resulting inconsistency in case law may create uncertainty for the executors of wills.
- 4.10 Justice Young in *Egan v O'Brien*⁸ identified four possible outcomes when there is a contingent gift over:
- the gift over fails
 - the gift over takes effect as if the condition of the gift was fulfilled
 - the gift over is interpreted according to the intent of the will-maker
 - the gift is held on constructive trust by the killer for the benefit of an appropriate person.

4 *Re Pollock* [1941] Ch 219; *Re Callaway* [1956] Ch 559; *Re Dellow's Will Trusts* [1964] 1 All ER 771; *Re Giles (deceased)* [1972] Ch 544.

5 *Re Peacock* [1957] Ch 310; *Re Worthington* [1978] WAR 144.

6 *Re Pollock* [1941] Ch 219; *Re Callaway* [1956] Ch 559; *Re Dellow's Will Trusts* [1964] 1 All ER 771; *Re Giles (deceased)* [1972] Ch 544.

7 *Re Peacock; Midland Bank Executor & Trustee Co Ltd v Peacock* [1957] Ch 310; [1957] 2 All ER 98.

8 [2006] NSWSC 1398.

Failure of gift over

- 4.11 Courts commonly interpret wills literally. If a condition of a gift over has not been fulfilled, the gift will fail.⁹ The gift will fall into the residue of the estate or, if there is no residue, be distributed as on intestacy. For example, in *Davis v Worthington*¹⁰ a gift was left to a friend who later unlawfully killed the will-maker. The will also provided that if the killer failed to survive her for 14 days then the gift was to go to the Muscular Dystrophy Research Association. Because the killer had survived the will-maker for 14 days, the gift failed and the Muscular Dystrophy Research Association was unable to take the gift.
- 4.12 This approach has been criticised as defeating the intention of the will-maker.¹¹ It would seem likely that in most circumstances when a will-maker has preferred a particular person over others to take a benefit if the principal beneficiary has died, they would also prefer that person to take the same benefit in any other situation in which the principal beneficiary would be ineligible to inherit.
- 4.13 However, there are circumstances in which it might be reasonable to think that the will-maker would not want the beneficiary of the gift over to inherit. For example, in *Public Trustee v Hayles*¹² the deceased gifted his estate to a friend and, in the event that this friend predeceased him, to the friend's mother, Mrs Hayles. Both beneficiaries were unrelated to the will-maker and there was no evidence that the deceased knew Mrs Hayles. The principal beneficiary killed the will-maker and the forfeiture rule applied to deny the killer any entitlement to the estate. At issue for the court was whether Mrs Hayles could inherit as the alternate beneficiary of the gift. The court applied a constructive trust over the gift and sought to determine who would be the correct beneficiary of that trust. The court found that it was more appropriate for the estate to be held on trust for the deceased's next of kin. The issue of whether it would be appropriate for the mother of the killer to inherit was not raised; however, Justice Young did refer to American cases that have limited the beneficiaries of a constructive trust to persons who are not related to the killer.¹³ Given the relationship between the potential beneficiary and the killer and the potential for the killer to benefit indirectly, a will-maker may not want the alternate beneficiary to inherit in these circumstances.

Gift over distributed on the basis of lapse

- 4.14 In other cases, the courts have taken alternative approaches in order to give effect to the will-maker's intention. One of these is to construe the will so that the gift over may take effect upon the application of the forfeiture rule as if the condition was fulfilled.¹⁴ This approach effectively means that the killer would be treated as having predeceased the will-maker. The gift would then be distributed to the beneficiary of the gift over.
- 4.15 There are circumstances in which the distribution of the gift over might indirectly benefit the killer. These include when the beneficiary of the gift over has a close relationship to the killer as mentioned above in reference to *Public Trustee v Hayles*. It might also be reasonable to conclude that the will-maker may not want the gift over to succeed in similar circumstances.

9 [1978] WAR 144.

10 Ibid.

11 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 22 October 1991, 4105 (Bernard Collaery); Law Commission (England and Wales), *The Forfeiture Rule and the Law of Succession*, Report No 295 (2005) 28.

12 (1993) 33 NSWLR 154.

13 Ibid 166; *In the Matter of Safran's Estate* 306 NW (2d) 27 (1981).

14 *Re Barrowcliff* [1927] SASR 147.

Gift over interpreted according to testamentary intent

- 4.16 The *Jones v Westcomb*¹⁵ rule has also been applied. This rule allows for the condition attached to a contingent gift over to be interpreted as if it extends to all other situations where the gift failed. For example, in *Re Keid*¹⁶ the deceased left her estate to her son but if her son were to predecease her without issue, then the estate was to go to her sisters. The will was construed by the court so that the condition of the gift over was the failure of the gift to the son rather than the death of the son. This failure could be brought about by death or by the operation of the forfeiture rule alike. The deceased's sisters were thereby able to inherit through the gift over.
- 4.17 However, later cases have held that the rule in *Jones v Westcomb* does not permit a court to interpret the will in such a way as to bring about a result that the court considers fair where that intention is not expressed or implied in the testamentary words.¹⁷ Instead, the court must interpret the words of the will according to their ordinary meaning. Accordingly, where the events on which the operation of the gift over are predicated do not occur, the gift over cannot take effect.¹⁸

Gift held on constructive trust

- 4.18 The approach preferred by Justice Young was that adopted in *Public Trustee v Hayles*.¹⁹ The court in that case held that the interest that would otherwise pass to the killer was to be held on constructive trust for a person considered appropriate by the court, having regard to any evidence of relationships and intentions that might affect the result of the trust. Where there is insufficient evidence, and in an appropriate case, the court may treat the disentitled beneficiary as if they had predeceased the will-maker by holding the trust to be in favour of those entitled as on the intestacy. Given the relationship of the beneficiary of the gift over with the killer and other circumstances of the case, the court held there was insufficient evidence that the constructive trust should be in favour of the killer's mother. The beneficial interest in the gift was then distributed in accordance with the laws of intestacy.
- 4.19 However, legal title to other types of gifts under a will do not ordinarily vest in the killer unless the property was distributed in ignorance of the unlawful killing.

Other jurisdictions

- 4.20 Other jurisdictions have developed legislative responses to clarify inconsistencies and the harsh effects of the common law.

Killer treated as predeceasing the victim

- 4.21 England and Wales, New Zealand and most jurisdictions in the United States have legislation that provides that an unlawful killer who loses any entitlement under a will as a result of the operation of the forfeiture rule is to be treated as having predeceased the victim.²⁰ A person named in the will as an alternative beneficiary will then normally acquire the property which was the subject of the gift over ahead of the victim's estate.

15 (1711) Prec Ch 316.

16 [1980] Qd R 610.

17 *Ekert v Mereider* (1993) 32 NSWLR 729.

18 *Ibid.*

19 (1993) 33 NSWLR 154.

20 *Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011* (UK) c 7, s 1 (inserting s 46A into the *Administration of Estates Act 1925* (UK)), s 2 (inserting s 33A of the *Wills Act 1937* (UK)); *Succession (Homicide) Act 2007* (NZ) s 7(3); American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (2003) § 8.4 cmt (k).

- 4.22 Provisions that establish that a killer is to be treated as having predeceased the victim may have an undesirable result where a gift over provides some indirect benefit to the killer, which might have been the outcome in *Public Trustee v Hayles* if the gift over had succeeded.²¹ If the killer's mother, who was unrelated to the victim, had been able to benefit from the gift over then she may have benefitted the will-maker's killer. However, the possibility of an indirect benefit accruing to the killer also exists in relation to the primary beneficiaries of a will. Whether an indirect benefit to the killer is likely to occur can only really be determined on a case-by-case basis in accordance with the particular circumstances and relationships of the parties involved.

Rectification of the will

- 4.23 If a will does not carry out the will-maker's intentions because of a clerical error or because it does not give effect to the will-maker's instructions, the Supreme Court of Victoria may make an order to rectify the will.²² It may modify the actual text as necessary to ensure that the will actually contains the provisions that the will-maker intended it to contain. The intention needs to be expressed in or implied by the words of the will: the court cannot give effect to what the will-maker would have intended had they considered unforeseen circumstances which have since arisen.²³
- 4.24 It has been argued that courts need to be able to ascertain the hypothetical intention of the will-maker in unforeseen circumstances—including when a beneficiary kills the will-maker—and construe the will accordingly.²⁴ As illustrated by the cases mentioned in this chapter, courts have found ways of varying the literal effect of a will to find a just and reasonable solution when a will-maker has died by the hand of a beneficiary. However, there is no clear authority for them to do so at common law or in legislation.
- 4.25 The Supreme Court of the Australian Capital Territory has a broad statutory power to rectify a will to give effect to the probable intention of the will-maker had they known of or anticipated circumstances that occurred around the time of or after their death:

The Supreme Court may order that the probate copy of the last will of a testator be rectified to give effect to the testator's probable intention if satisfied that—

- (a) any of the following apply in relation to circumstances or events (whether they existed or happened before, at or after the execution of the will):
- (i) the circumstances or events were not known to, or anticipated by, the testator;
 - (ii) the effects of the circumstances or events were not fully appreciated by the testator;
 - (iii) the circumstances or events arose or happened at or after the death of the testator; and
- (b) because of the circumstances or events, the application of the provisions of the will according to their tenor would fail to give effect to the probable intention of the testator if the testator had known of, anticipated or fully appreciated their effects.²⁵

21 Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31 *Common Law World Review* 1, 31–32.

22 *Wills Act 1997* (Vic) s 31.

23 Charles Rowland, 'The Construction or Rectification of Wills to take Account of Unforeseen Circumstances Affecting their Operation: Part 1' (1993) 1 *Australian Property Law Journal* 87, 91.

24 Charles Rowland, 'The Construction or Rectification of Wills to take Account of Unforeseen Circumstances Affecting their Operation' (1993) 1 *Australian Property Law Journal* 87; (1993) 1 *Australian Property Law Journal* 193.

25 *Wills Act 1968* (ACT) s 12A.

- 4.26 The National Committee for Uniform Succession Laws guided the National Uniform Succession Laws project, which was an initiative of the former Standing Committee of Attorneys-General. The aim of this project was to develop uniform succession law and practice across Australia. The Committee said that the rectification power in the Australian Capital Territory was ‘revolutionary’ and did not recommend that it be adopted nationally.²⁶ It suggested that the rectification power, as articulated in the Australian Capital Territory legislation, may be too broad and might have the potential to destabilise the accepted rules for construing a will.²⁷ This has not proved to be the case in the Australian Capital Territory, where it has been in place since 1991.

Questions

- 5 How should contingent gifts over be distributed upon the application of the forfeiture rule?
- 6 Should the courts have a discretion to rectify a will to fulfil the will-maker’s probable intent?

When the deceased dies intestate

- 4.27 The forfeiture rule extends to the statutory provisions governing the distribution of an intestate estate.²⁸ An unlawful killer is therefore precluded from inheriting from their victim on intestacy.²⁹ The disentitled beneficiary is then treated as notionally not in existence, and other relatives would inherit the estate in accordance with the intestacy provisions of the *Administration and Probate Act 1958* (Vic).³⁰ If there is no next of kin, the property goes to the Crown.³¹

Consequences for third-party beneficiaries

- 4.28 As a consequence of the forfeiture rule, anyone who claims through the killer would also be precluded from inheriting under intestacy laws.³² In *Re DWS (deceased)* an only son was convicted of murdering his parents, who both died intestate. The killer’s two-year-old son, and the victims’ grandchild, claimed the estate. If the killer had predeceased his parents, then their grandchild would have ordinarily inherited under intestacy laws. However, the court held that the forfeiture rule did not require the courts to treat the killer as having predeceased the victim and the intestacy rules under the *Administration of Estates Act 1925* were to be given their literal meaning. The victim’s only grandchild was therefore precluded from inheriting the estate, which went to other relatives.
- 4.29 In Victoria, under the *Administration and Probate Act 1958* an intestate estate is to be distributed in equal shares among the children of the intestate living at the time of their death and the living representatives of any children who predeceased the intestate.³³ A literal interpretation of this provision would also preclude the descendants of unlawful killers, who are ineligible to inherit as a result of the forfeiture rule, from claiming an intestate estate in Victoria.

26 National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys-General on the Law of Wills*, Queensland Law Reform Commission Miscellaneous Paper 29 (1997) 59–61.

27 National Committee for Uniform Succession Laws, *Uniform Succession Laws for Australian States and Territories: First Issues Paper: The Law of Wills*, Queensland Law Reform Commission Working Paper 46 (1994) 44–45.

28 *Re Sangal* [1921] VLR 355.

29 *Helton v Allen* (1940) 63 CLR 691; *Re Sangal* [1921] VLR 355.

30 *Public Trustee v Fraser* (1987) 9 NSWLR 433; *Administration and Probate Act 1958* (Vic) s 55.

31 *Administration and Probate Act 1958* (Vic) s 55.

32 *Re DWS (deceased)* [2001] Ch 568.

33 *Administration and Probate Act 1958* (Vic) s 52(f).

- 4.30 The outcome of the decision in *Re DWS (deceased)* was criticised by the Law Commission of England and Wales for unfairly punishing the descendants of an unlawful killer, particularly as it is likely that the victims in that case may have preferred their grandchild to inherit.³⁴ The exclusion of the unlawful killer's descendants also produces an arbitrary distinction between the rights of children of an unlawful killer and the children of other relatives. This outcome may be inconsistent with the general policy of intestacy law, which gives preference to descendants over siblings and other relatives.³⁵

Other jurisdictions

- 4.31 In Australia, the National Committee for Uniform Succession Laws recommended that, where the forfeiture rule prevents a person from sharing in an intestate estate, then that person should be deemed to have died before the intestate.³⁶ This is the case in New South Wales and Tasmania, but all other Australian jurisdictions are yet to give effect to this recommendation.³⁷

Killer treated as having predeceased the victim

- 4.32 Treating the killer as having predeceased the victim is a pragmatic and simple solution that has been adopted in both England and New Zealand. In England and Wales, the *Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011* amended the law so that if a person is entitled to an interest in an intestate estate, or a under a will, and forfeits it under the forfeiture rule, the person is treated as having died immediately before the deceased.³⁸ New Zealand also adopted a similar provision in their codification of the forfeiture rule.³⁹ These reforms ensure that the children of a disentitled person are able to inherit despite the operation of the forfeiture rule.

Exclusion of beneficiaries to prevent indirect benefit

- 4.33 The Uniform Probate Code in the United States provides that an unlawful killer is to be deprived of their share of the victim's estate.⁴⁰ Where the victim dies intestate, the court will often interpret intestacy laws in order to restrict the beneficiaries of a slayer's share to those eligible to receive property from the victim on intestacy.⁴¹ Courts in the United States will also sometimes exclude beneficiaries who would otherwise benefit under the intestacy provisions, if it is possible that the slayer could indirectly benefit from their receipt of the property.⁴²

34 Law Commission (England and Wales), *The Forfeiture Rule and the Law of Succession*, Report No 295 (2005) 2.

35 Ibid.

36 New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy Report No 116* (2007) 210.

37 *Succession Act 2006* (NSW) s 139(b); *Intestacy Act 2010* (Tas) s 40(b).

38 *Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011* (UK) c 7, s 1 (inserting s 46A into the *Administration of Estates Act 1925* (UK)), s 2 (inserting s 33A of the *Wills Act 1937* (UK)).

39 *Succession (Homicide) Act 2007* (NZ) s 7(3).

40 UPC § 2-803(b) (2010).

41 Karen J Sneddon, 'Should Cain's Children Inherit Abel's Property?: Wading into the Extended Slayer Rule Quagmire' (2007) 76 *University of Missouri at Kansas City Law Review* 101, 131, 133; *Cook v Grierson* 845 A 2d 1231, 1232–3 (Md, 2004).

42 Karen J Sneddon, 'Should Cain's Children Inherit Abel's Property?: Wading into the Extended Slayer Rule Quagmire' (2007) 76 *University of Missouri at Kansas City Law Review* 101, 131–4. Sneddon argues that this was the likely motivation for the Maryland Court of Appeals' strict interpretation of the Maryland intestacy statute in *Cook v Grierson* 845 A 2d 1231 (Md, 2004).

Questions

- 7 Should Victoria's intestacy laws permit an unlawful killer's descendants to inherit from the victim, as representatives of the killer?
- 8 Are there any circumstances in which an unlawful killer's descendants should be prevented from inheriting from the victim?

When the deceased and their killer are joint tenants

- 4.34 Succession rights give beneficiaries an expectation of obtaining an interest in a property. In contrast, when the deceased and their killer are joint tenants, the killer already has a stake in and existing rights over the property. In a joint tenancy between two people, the surviving joint tenant's existing rights are enlarged by the death of the other joint tenant, as the entirety of the property would then vest in the survivor through the right of survivorship. Where there are more than two joint tenants, a victim's interest would ordinarily vest jointly in the survivors.
- 4.35 However, under the forfeiture rule an unlawful killer cannot benefit from the death of their victim. Due to the nature of joint tenancies, the courts have had to contend with the particular problem of deciding how to ensure that the killer does not benefit from their crime, while not depriving the killer or third parties of their legal rights.
- 4.36 Australian case law has taken two distinct approaches to this issue.⁴³ In earlier cases, the courts distributed the property as though the owners had been tenants in common.⁴⁴ In *Re Barrowcliff*,⁴⁵ Justice Napier did not decide whether this situation arises from a severance of the joint tenancy or as an exception to the ordinary rules of survivorship. Either way, the killer could be perceived as gaining the benefit of a severance of the joint tenancy while the victim has lost their right of survivorship.
- 4.37 However, this approach is no longer favoured by the courts in Australia.⁴⁶ Instead, they have followed the approach adopted in *Re Thorp and the Real Property Act*,⁴⁷ which held that legal title to the property passed to the killer. As the forfeiture rule applied, the court also held that to prevent the killer from benefitting from their crime they were to hold the victim's interest in the property on constructive trust for the benefit of the victim's estate.⁴⁸ It has been suggested that this approach has the advantage of certainty in regard to the legal title,⁴⁹ but it also produces different results, depending on the number of joint tenants.

43 G E Dal Pont and K F Mackie, *Law of Succession* (LexisNexis Butterworths, 2013), 178.

44 *Re Barrowcliff* [1927] SASR 147; *Kemp v The Public Curator of Queensland* [1969] QdR 145.

45 [1927] SASR 147.

46 *Rasmanis v Jurewitsch* [1970] 1 NSW 650; *Re Stone* [1989] 1 Qd R 351; *Nay v Iskov* [2012] NSWSC 598; *Re Nicholson* [2004] QSC 480.

47 [1962] NSW 889.

48 *Ibid.*

49 *Re Stone* [1988] 1 Qd R 351, 352.

When there are two joint tenants

- 4.38 When the killer and the victim are the only joint tenants, legal title in the property will vest in the killer upon the death of the other joint tenant. A half interest in the property is to then be held on constructive trust for the benefit of the victim's estate.⁵⁰ The remaining half interest is to be held by the killer for his or her own benefit.
- 4.39 Should the representatives of the victim's estate want to obtain access to their beneficial interest through the sale of the property but the killer will not agree then they may apply to the Victorian Civil and Administrative Tribunal for an order for sale under the *Property Law Act 1958* (Vic).⁵¹

When there are multiple joint tenants

- 4.40 Where more than two people own a property as joint tenants, then a severance in equity would be necessary. In *Rasmanis v Jurewitsch*,⁵² the court held that the interest of the victim was severed and the benefit of that interest then vested in the innocent joint tenants so that the killer could never benefit from the victim's share of the property if the surviving joint tenants predeceased the killer.
- 4.41 For example, if there were five joint tenants and one of those joint tenants killed another, the interest of the victim would be held on trust for the benefit of the three remaining innocent joint tenants. The joint tenancy would remain between the killer and the innocent joint tenants over eighty per cent of the property (which excludes the interest of the victim). This outcome can advantage the unlawful killer in comparison to the victim's estate because the victim's interest in property vests in the innocent joint tenant rather than in the estate. In contrast, the killer is able to retain enjoyment of their interest in the property.

Other jurisdictions

- 4.42 Other common law jurisdictions have adopted a range of approaches as to how the forfeiture rule will affect a joint tenancy. The most widely used approach is to treat the property subject to the joint tenancy as if the owners were tenants in common. This was the dominant approach in Australian common law prior to the decision in *Rasmanis v Jurewitsch*.

Property distributed as if owners were tenants in common

- 4.43 Under both the *Succession (Homicide) Act 2007* (NZ) (NZ Act) and the Uniform Probate Code in the United States, a property owned as a joint tenancy between an unlawful killer, their victim and any other party is to devolve at the death of the victim as if the property were owned by each as tenants in common in equal shares.⁵³ This approach has been applied in some form in a majority of United States jurisdictions.⁵⁴

50 *Rasmanis v Jurewitsch* [1970] 1 NSW 650.

51 *Property Law Act 1958*, pt IV.

52 [1970] 1 NSW 650.

53 *Succession (Homicide) Act 2007* (NZ) s 8(3); UPC § 2-803(c)(2) (2010).

54 American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011), § 45, reporter's note (h). Statutes taking this approach include: Iowa Code § 633.535(2) (2013) (as interpreted by the Supreme Court of Iowa in *In re estate of Thomann* 649 NW 2d 1 (Iowa, 2002)); Ala Code § 43-8-253(b) (2013); Cal Prob Code § 251 (LexisNexis 2014); Conn Gen Stat § 45a-447(a)(3) (2013); Fla Stat § 732.802(2) (2013); Nev Rev Stat Ann § 41B.320(2)(a) (2013).

- 4.44 A severance of a joint tenancy will prevent the killer from gaining ownership of the whole of the property through survivorship or from enlarging their share by receiving part of the victim's share where there are multiple joint tenants. This results in neither a gain nor a loss for any of the joint tenants. Further, it may result in equitable outcomes for beneficiaries of the killer and deceased in particular circumstances, such as where a husband and wife die as a result of a murder-suicide and where each deceased has different innocent beneficiaries.⁵⁵
- 4.45 However, the nature of a joint tenancy is such that it only guarantees a life interest in a property to each of the joint tenants who then take the risk that their beneficiaries on death may not obtain an interest upon their death. A severance of a joint tenancy will therefore deprive other joint tenants who are innocent of the crime of an opportunity to acquire the property in its entirety by survivorship. In contrast, the killer, who could have taken steps to sever the joint tenancy while the victim was alive, is insulated from the risk inherent in their choice of property ownership and the value of their interest is preserved.

Property held on constructive trust

- 4.46 The approach more recently preferred by Australian courts is that in *Rasmanis v Jurewitsch*, where legal title in the property vests in the unlawful killer through the right of survivorship but the victim's interest is held on constructive trust for the victim's estate.
- 4.47 However, this outcome benefits the unlawful killer by providing for an immediate division of the property in equity.⁵⁶ As seen in *Rasmanis v Jurewitsch*, a constructive trust is also not a workable solution for property held by multiple joint tenants. Differential treatment on the basis of the numbers of joint tenants could lead to the law being perceived as inconsistent, unnecessarily complex and unjust.

Killer treated as having predeceased the victim

- 4.48 Massachusetts and West Virginia take a different approach to other American jurisdictions. Legislation in these states provides that a person who kills their fellow joint tenant is treated as though they predeceased their victim, so that the whole property will go to the victim's estate, with no interest retained by the killer.⁵⁷ This approach would result in the victim's estate receiving the entirety of the property if there were not other joint tenants. However, where there are multiple joint tenants, the victim's estate would have no interest in the property as it would vest in the surviving joint tenants through the right of survivorship.⁵⁸ The killer could also be considered to have been stripped of their existing legal interest.⁵⁹

55 American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 45 cmt (h) illustration (15).

56 John Tarrant, 'Unlawful Killing of a Joint Tenant' (2008) 15 *Australian Property Law Journal* 224, 236.

57 Ibid 230; W Va Code § 42-4-2 (2013) (as interpreted in *Lakatos v Billotti* 509 SE 2d 594 (W Va, 1998)); Robert F Hennessy, 'Property Note—The Limits of Equity: Forfeiture, Double Jeopardy, and the Massachusetts "Slayer Statute"' (2009) 31 *Western New England Law Review* 159, 160; Mass Gen Laws ch 265 § 46 (2013).

58 Law Commission (England and Wales) above n 34, 33.

59 Robert F Hennessy, 'Property Note—The Limits of Equity: Forfeiture, Double Jeopardy, and the Massachusetts "Slayer Statute"' (2009) 31 *Western New England Law Review* 159, 161.

- 4.49 The New Zealand Law Commission recommended that New Zealand follow this approach as this outcome reflects the risk that the killer undertook when entering the joint tenancy arrangement.⁶⁰ This simple solution prevents the killer from enjoying the benefit of the property in their lifetime.⁶¹ However, their recommendation was not followed by the New Zealand legislature, as it would have led to inconsistent outcomes because the killer could have used the *Property (Relationships) Act 1976* (NZ) to reclaim an interest in the property if they were in a relationship with the victim, but not otherwise.⁶² This is not an issue in Victoria.

Question

- 9 How should the courts distribute property subject to a joint tenancy once the forfeiture rule has been applied?
- (a) Should an unlawful killer be able to retain their interest in the property?
- (b) Should the victim's estate be able to keep the victim's interest in the property where there are multiple joint tenants?

When the deceased has an entitlement to property

- 4.50 An unlawful killer may also kill a person who is not the will-maker or outright owner of a property but from whose death they would benefit. The victim may be someone else in a 'chain of gifts'.⁶³ For example, the victim and the killer might both be beneficiaries of a trust, where the victim's entitlements under that trust would transfer to the killer. Alternatively, the victim might have a lifetime interest in a property that will vest in the killer upon the victim's death.
- 4.51 Justice Gzell in *Batey v Potts*⁶⁴ stated that:
- The public policy against benefiting from one's crime is not limited to fixed categories. Nor does it focus upon the manner in which the felony results in benefit to the perpetrator.
- 4.52 The forfeiture rule will therefore apply to prevent these entitlements, which would not have gone to the killer but for the killing, from being transferred to the unlawful killer.
- 4.53 In *Batey v Potts*, the will-maker granted her husband a right to reside in the matrimonial home for the term of his life. Upon his death, the residential property was to be held on trust with the residue of her estate to pay the net income to her son until he turned 35 and thereafter to pay the capital and income to him. If that trust was to fail, then the property was to go to other relatives.
- 4.54 The son of the will-maker unlawfully killed his father. However, the gifts in the will to the unlawful killer did not flow to the killer as a result of the unlawful killing and were unaffected by the forfeiture rule. The killing did have the effect of accelerating the son's interest in the residential property under his mother's will and it was the benefit of that acceleration that the forfeiture rule prevented.

60 Law Commission (New Zealand), *Succession Law: Homicidal Heirs*, Report No 38 (1997) 26; New Zealand, *Parliamentary Debates*, House of Representatives, 8 May 2007, 8986 (Ruth Dyson).

61 John Tarrant, above n 56, 235.

62 New Zealand, *Parliamentary Debates*, House of Representatives, 8 May 2007, 8986 (Ruth Dyson).

63 R F Croucher and P Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 3rd ed, 2009), 537. [2004] NSWSC 606, [21].

- 4.55 The court found that in such circumstances the appropriate remedy is to deprive the killer of the enjoyment of their interest for the period of the victim's life expectancy. However, the court used its discretion under the NSW Act to modify the effect of the rule.

Other property of the deceased

- 4.56 Once the forfeiture rule has been applied, an unlawful killer will also be barred from taking a benefit from insurance, superannuation and any pension rights that might accrue to them as a consequence of the death of their victim.⁶⁵ These matters are largely regulated by Commonwealth legislation and are beyond the scope of this reference. However, any modifications made to the common law through statute will have a broader effect on the disposition of these assets. Courts exercising federal jurisdiction in Victoria will apply the modified common law of Victoria where it is not inconsistent with Commonwealth legislation.⁶⁶
- 4.57 Justice Lloyd in *Re Fitter*⁶⁷ ordered that benefits from the deceased's superannuation be held by the killers on constructive trust for the sister of the victim, relying on the NSW Act to apply the forfeiture rule to prevent the beneficiaries, who were not guilty of the killing because of mental illness, from benefiting from the victim's superannuation. The validity of this order was not considered in a collateral proceeding, as the trustees of the superannuation account exercised their discretion not to pay once the forfeiture rule had been applied.⁶⁸
- 4.58 Under the NZ Act, a killer is also explicitly disentitled to any property interests in the non-probate assets of their victim.⁶⁹ These include the nomination of a bank account or of superannuation benefits, gifts the victim made in contemplation of death, trusts settled by the victim that were revocable by the victim in his or her lifetime, beneficial powers of appointment that were exercisable by the victim in his or her lifetime and joint tenancies. These assets are distributed following the application of the forfeiture rule as though the killer had died before their victim.⁷⁰

Question

- 10 How should the forfeiture rule apply to other assets that are not within the deceased's estate?

65 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 (CA); *Re Field and the Commonwealth of Australia* (1983) 5 ALD 571, 574–575; *R v National Insurance Commissioner, Ex parte Connor* [1981] 1 QB 758.

66 *Judiciary Act 1903* (Cth) s 80.

67 *Re Fitter; Public Trustee v Fitter* [2005] NSWSC 1188.

68 See *Fitter v Public Trustee* [2007] NSWSC 1487.

69 *Succession (Homicide) Act 2007* (NZ) s 8(1).

70 *Ibid* s 8(2).

Family provision applications

- 4.59 In Victoria, a person for whom a deceased person had a responsibility to make provision can apply for a court order redistributing the deceased person's estate in their favour.⁷¹ This can occur whether or not the deceased person made a will.⁷²
- 4.60 In making a decision on a family provision application, the court is required to have regard to a number of statutory factors including the character and conduct of the applicant.⁷³ An unlawful killing is conduct that is likely to be viewed negatively by the court in any application for family provision.
- 4.61 The *Administration and Probate Act 1958* (Vic) can also be regarded as having been enacted against the background of the forfeiture rule. As any absence of proper provision for the claimant was caused by the forfeiture rule itself, persons precluded under that rule from taking an interest in an estate would not be able to claim for family provision.⁷⁴ Any other outcome could be regarded as inconsistent with the public policy underlying the forfeiture rule, as it would enable unlawful killers to circumvent the rule through claims for family provision from the deceased's estate.⁷⁵

Other jurisdictions

- 4.62 Generally, most common law jurisdictions, like Victoria, appear to preclude unlawful killers from claiming family provision or equivalent entitlements from the estate of their victim where the forfeiture rule applies.⁷⁶ However, the UK and NSW Acts provide unlawful killers with an avenue for making an application for family provision from their victim's estate where the effect of the rule is modified by the court pursuant to statute.⁷⁷

Question

- 11 Should the forfeiture rule prohibit an unlawful killer from applying for a share of the victim's estate under family provision legislation?

71 *Administration and Probate Act 1958* (Vic) s 91(1).

72 *Ibid* s 91(4).

73 *Ibid* s 91(4)(o).

74 *Re Royse (deceased)* [1985] Ch 22; *Troja v Troja* (1994) 35 NSWLR 182.

75 *Troja v Troja* (1994) 35 NSWLR 182, 186.

76 *Re Royse (deceased)* [1985] Ch 22; *Troja v Troja* (1994) 35 NSWLR 182; *Succession (Homicide) Act 2007* (NZ) s 9; UPC § 2-803(b). The ACT Act does not refer to family provision applications.

77 *Forfeiture Act 1982* (UK) s 3; *Forfeiture Act 1995* (NSW) ss 3, 5. It is unclear whether an application for family provision can be made in the Australian Capital Territory as family provision is not included within the definition of property in the *Forfeiture Act 1991* (ACT) s 2.

Options for legislative reform

- 50 The need for legislation
- 52 Option 1: Amend existing legislation to clarify the effect of the rule
- 53 Option 2: Empower the courts to modify the effect of the rule
- 56 Option 3: Codify the rule

5. Options for legislative reform

The need for legislation

- 5.1 In Chapters 3 and 4, a number of complexities and ambiguities in applying the forfeiture rule were discussed, together with some of the ways in which they have been addressed in different jurisdictions. A recurring issue is that the application of the rule can lead to harsh outcomes. The issue notably arises in manslaughter cases where the killer has received an appropriately merciful sentence because of low moral culpability yet the rule has operated without leniency. These are often cases where a woman has killed her partner, in fear for her life or safety—and that of her children—after suffering his abuse and violence for many years.
- 5.2 As discussed in Chapter 2, there was a series of manslaughter cases of this nature during the 1980s where the court did not apply the rule. However, the traditional formulation of the rule was re-affirmed by the Supreme Court of New South Wales, in *Troja v Troja*,¹ and by the Supreme Court of Victoria, in *Estate of Soukup*.²
- 5.3 The law in Victoria is that the courts have no discretion to modify the rule. Justice Gillard observed in *Estate of Soukup* that ‘for a judge to abrogate or modify the rule in a manslaughter case on the ground that the level of moral culpability is small is to indulge in judicial legislation’.³ While the injustice that can be caused by the application of the rule is not denied, resolution is in the hands of the legislature, not the courts.
- 5.4 Commentators have said that the courts have abdicated responsibility for the ongoing suitability of a rule they created to the needs of modern society.⁴ In his dissenting judgement in *Troja v Troja*, President Kirby reasoned that the Court had a duty to revise the rule:

The knowledge of domestic violence allowed to judges, and of the circumstances in which conduct, although manslaughter, can sometimes be morally virtually blameless, requires of them a rule of sufficient flexibility which accords with the justice of the case. Otherwise, the law becomes a vehicle for serious injustice. That must not be allowed to occur—especially by the slavish adherence to the non-binding authority of another country. The rule in question has been made by judges. It has already been developed, in part, by judges. It is still in the process of refinement. It is not a breach of this Court’s duty to the law to clarify the stage which that refinement has reached.⁵

1 (1994) 33 NSWLR 269.

2 (1997) 97 A Crim R 103.

3 Ibid 114.

4 Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 33; Barbara Hamilton and Elizabeth Sheehy, ‘Thrice Punished: Battered Women, Criminal Law and Disinheritance’ (2004) 3 *Southern Cross University Law Review* 96, 128.

5 *Troja v Troja* (1994) 33 NSWLR 269, 285.

- 5.5 An underlying reason for the difference of opinion is a divergence of views about the nature of the rule: whether it is a rule of law or a principle applied in equity.
- 5.6 One line of analysis characterises the rule as a rule of law. This means that, once the court has decided that the person has unlawfully killed the victim, the rule must be applied simply and strictly, without regard to the circumstances of the case. Lord Atkin described it as an ‘absolute rule’ in *Beresford v Royal Insurance*:⁶
- I think that the principle is that a man is not to be allowed to have recourse to a court of justice to claim a benefit from his crime whether under a contract or a gift. No doubt the rule pays regard to the fact that to hold otherwise would in some cases offer an inducement to crime or remove a restraint on crime, and that its effect is to act as a deterrent to crime. But apart from these considerations the absolute rule is that courts will not recognise the benefit accruing to a criminal from his crime.⁷
- 5.7 This is the traditional formulation of the rule, as upheld in the line of authorities that were followed by the majority in *Troja v Troja*, and by Justice Gillard in *Estate of Soukup*. It follows from this reasoning that, as the court has no discretion not to apply the rule strictly and absolutely, any change to it is a matter for the legislature.
- 5.8 Alternatively, the forfeiture rule has been characterised as a principle of equity or equitable doctrine. On this view, the court can decide whether it would be in accordance with good conscience to allow the killer to obtain a benefit in the circumstances.⁸ The rule is taken into account and applied in accordance with established equitable notions of unconscionability and the prevention of unjust enrichment.⁹ This approach is consistent with that taken by President Kirby in *Troja v Troja*¹⁰ (in dissent) and by the court in *Public Trustee v Fraser*,¹¹ *Public Trustee v Hayles*,¹² *Re Keitley*¹³ and *Miliankos v Miliankos*.¹⁴ It is also the approach generally taken to the interpretation of the equivalent codified rule in the United States, the ‘slayer rule’.
- 5.9 Nevertheless, it is clear that in Victoria any modification of the forfeiture rule to address the issues raised in Chapters 3 and 4 can be achieved only through legislative intervention.
- 5.10 In this chapter, three approaches to legislative reform are discussed. The first two supplement the common law rule without modifying it. The third redefines the rule itself.
- Option 1 clarifies the effect of the rule on the distribution of the killer’s share of the deceased’s estate and other forfeited benefits arising from the victim’s death.
 - Option 2 gives the court discretion to modify the effect of the rule, along the lines permitted by the Forfeiture Acts in the United Kingdom, the Australian Capital Territory and New South Wales.
 - Option 3 replaces the common law rule with a statutory code.
- 5.11 The Commission would welcome submissions on which option, combination of options, or other alternative is most suited to reforming the forfeiture rule in Victoria.

6 (1938) AC 586.

7 Ibid 598.

8 Charles Rowland ‘The Killer Beneficiary’ June 1999 (unpublished speaking notes provided by the author).

9 No cause of action may be founded on an immoral or illegal act: *Troja v Troja* (1994) 33 NSWLR 269, 278.

10 (1994) 33 NSWLR 269, 282.

11 (1987) 9 NSWLR 433 (Kearney J).

12 (1993) 33 NSWLR 154 (Young J).

13 [1992] 1 VR 583 (Coldrey J).

14 [1994] VSC 7993 (24 March 1994) (Nathan J).

Option 1: Amend existing legislation to clarify the effect of the rule

- 5.12 One approach to addressing the issues discussed in Chapter 4 concerning the effect of the rule on the distribution of the deceased's assets could be to amend the legislation under which those assets are normally distributed. The common law rule of forfeiture would be unchanged but its effect would be clarified and modified. This option could be adopted alone, or in conjunction with either Option 2 or Option 3.
- 5.13 The following are examples of amendments that could be considered. They are presented to illustrate the option and do not reflect the Commission's concluded view on any particular reform.
- Amend the *Wills Act 1997* (Vic) and the *Administration and Probate Act 1958* (Vic) to specify the effect on the distribution of the deceased's estate. This would provide some clarity for the executor or administrator of the deceased's estate, and could avoid the cost of seeking directions from the court. It would put beyond doubt the interaction of the rule and the statutory intestacy scheme, and assist in interpreting the provisions of a will when there is a gift over.
 - Amend the *Wills Act* to enable the Supreme Court to alter the literal effect of a will to deal with unforeseen circumstances, along the lines of section 12A(2) of the *Wills Act 1986* (ACT).¹⁵
 - Amend the *Wills Act* to clarify how the court should interpret a will that was revised in the killer's favour by the victim after they had been fatally wounded, or that was prepared in contemplation of the act, such as in situations of assisted suicides or mercy killings.¹⁶
 - Amend the *Administration and Probate Act* to specify whether or when a killer beneficiary is entitled to make an application for family provision under Part IV of that Act.
 - Amend the *Property Law Act 1958* (Vic) to clarify the effect of the rule on property co-owned by the killer, the victim and any other person.
- 5.14 This option would not address questions about the scope of the unlawful killings that are encompassed by the rule but it would make the law clearer for the executor or administrator of the victim's estate.

Question

- 12 Should issues about the effect of the forfeiture rule on the property and benefits that the killer would otherwise have derived on the death of the victim be addressed by amending the existing legislation under which the property of a deceased person is distributed?

15 See C J Rowland 'The Construction or Rectification of Wills to take Account of Unforeseen Circumstances Affecting their Operation' (1993) 1(2) *Australian Property Law Journal* 87; (1993) 1(3) *Australian Property Law Journal* 193.

16 G E Dal Pont and K F Mackie claim that the common law recognises this as an exception but the law is nebulous and it is unclear whether it applies in Australia: G E Dal Pont, *Law of Succession* (LexisNexis Butterworths, 2013), 172. See also *Lundy v Lundy* (1895) 24 SCR 650.

Option 2: Empower the courts to modify the effect of the rule

- 5.15 Victoria could introduce legislation that is similar to the UK Act, the ACT Act and the NSW Act. The common law rule would be unaffected but interested parties could apply to a court for an order modifying the effect of the rule.
- 5.16 This model was favoured by the Victorian Attorney-General's Law Reform Advisory Council. In May 1995, it recommended that:
- Legislation be enacted similar to that in England, allowing the court to modify, in appropriate circumstances, the rule which precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.¹⁷
- 5.17 Reporting nine years later on the results of its review of the forfeiture rule, the Tasmania Law Reform Institute recommended that Tasmania introduce a Forfeiture Act that would closely follow the same model, and particularly the NSW Act.¹⁸
- 5.18 An advantage of this option is that the legislation could be consistent with that which has been introduced in other Australian jurisdictions.
- 5.19 However, although the UK Act, ACT Act and NSW Act have been in force for some time, it is not easy to determine their direct impact on the rule itself. They appear to have reinforced the status quo. As the court in those jurisdictions is able to modify the effect of the rule, it does not need to expressly decide the question of whether the rule applies at common law. Even if there is doubt about whether the rule applies, a court that considers that the rule should not apply in the circumstances can provide relief.

Question

- 13 Should Victoria introduce legislation, like that in the United Kingdom, Australian Capital Territory and New South Wales, that empowers a court to modify the effect of the forfeiture rule?

Specific considerations

- 5.20 Any new Victorian legislation that empowers a court to modify the effect of the rule would need to establish a scheme for applications to be made to the court, and processed, for this purpose. The UK Act, ACT Act and NSW Act contain relevant provisions that Victoria could consider adopting—or adapting where they have been shown to require improvement.
- 5.21 Some of these considerations are set out below. The Commission would welcome submissions on these or other considerations that should be taken into account if this option were adopted.

¹⁷ Victorian Attorney-General's Law Reform Advisory Council, *Annual Report 1995* (1995), 12.
¹⁸ Tasmania Law Reform Institute, *The Forfeiture Rule*, Final Report No 6 (2004), 2–3.

Who may apply

- 5.22 The UK Act and ACT Act do not specify who may apply for an order to modify the effect of the rule.
- 5.23 The NSW Act allows an ‘interested person’ to apply.¹⁹ An ‘interested person’ is defined as any of the following:
- (a) an offender
 - (b) the executor or administrator of the estate of a deceased person
 - (c) a beneficiary under the will of a deceased person or a person who is entitled to any estate or interest on the intestacy of a deceased person
 - (d) a person claiming through an offender
 - (e) any other person who has a special interest in the outcome of an application for a forfeiture modification order.²⁰
- 5.24 The Tasmania Law Reform Institute prefers the New South Wales approach, observing that, if the killer cannot or does not wish to apply for an order, an application can be made by someone who could inherit through the killer, or the killer’s creditors.²¹ Applications under the forfeiture legislation could be seen as an alternative to making a claim for family provision under Part IV of the Administration and Probate Act, or as a way of drawing on the deceased victim’s estate to recover a debt owed by the disentitled beneficiary.

Time for applications

- 5.25 It would be desirable if the time period within which an application may be made for an order modifying the effect of the rule were determined in view of the timescale associated with administering and distributing a deceased estate. For example, an application for family provision must be made within six months of the grant of probate of the will or letters of administration.²² This could possibly be a useful timeframe for an application to be made where the person is not prosecuted, but much more time is needed in the event of criminal proceedings.
- 5.26 In the United Kingdom and the Australian Capital Territory, proceedings to modify the effect of the rule for a person convicted of an unlawful killing (or of aiding, abetting, counselling or procuring the death of the victim) must be brought within three months of the conviction.²³ In New South Wales, the application must be made within 12 months of the date on which the forfeiture rule takes effect and the court may give leave for a late application.²⁴

Guidance for exercise of discretion

- 5.27 Providing the court with discretion allows for a decision to be made in view of the circumstances of the case, but increases the risk of uncertain and inconsistent outcomes. Any Victorian legislation of this type could specify the factors to which the court should have regard.

19 *Forfeiture Act 1995* (NSW) s 5.

20 *Ibid* s 3.

21 Tasmania Law Reform Institute, above n 18, 25–26.

22 *Administration and Probate Act 1958* (Vic) s 99. The court may extend this timeframe.

23 *Forfeiture Act 1982* (UK) c 34 s 2(3); *Forfeiture Act 1991* (ACT) s 3(4).

24 *Forfeiture Act 1995* (NSW) s 7.

- 5.28 The UK Act and ACT Act provide little guidance as to how the discretion should be exercised. They state that the court is to have regard to the conduct of the offender and the deceased and to 'other circumstances that appear to ... be material'.²⁵
- 5.29 The NSW Act adds that the court should also have regard to 'the effect of the application on the offender or any other person'.²⁶

Property interests affected

- 5.30 The legislation would need to clarify the property that is affected by an order to modify the effect of the forfeiture rule.
- 5.31 In the Australian Capital Territory, the court may modify the effect of the rule in respect of 'any interest in property that the offender would have acquired but for the operation of the forfeiture rule'.²⁷ 'Property' includes 'any thing in action or incorporeal moveable property'.²⁸
- 5.32 In New South Wales, an order modifying the rule may apply to a 'benefit', which includes any interest in property and any entitlement under Chapter 3 of the *Succession Act 2006* (NSW).²⁹
- 5.33 It may well assist in clarifying the effect of the forfeiture rule to include a clear description in any similar Victorian legislation.

Question

- 14 If Victoria introduced legislation that empowers a court to modify the effect of the forfeiture rule:
- Who should be able to apply for the rule to be modified?
 - What should be the time limit for making an application?
 - What principles, if any, governing the court's discretion should be stated in the legislation?
 - What guidance should the court be given in exercising its discretion?
 - Which property and other interests should be able to be affected by the order?

²⁵ *Forfeiture Act 1982* (UK) c 34 s 2(2); *Forfeiture Act 1991* (ACT) s 3(2).

²⁶ *Forfeiture Act 1995* (NSW) s 5(3).

²⁷ *Forfeiture Act 1991* (ACT) s 3(3).

²⁸ *Ibid* Dictionary.

²⁹ *Forfeiture Act 1995* (NSW) s 3. Chapter 3 of the *Succession Act 2006* (NSW) provides for applications to be made for family provision orders.

Option 3: Codify the rule

- 5.34 Victoria could introduce legislation that replaces the common law rule with a statutory code that specifies the unlawful killings that attract the operation of the code and how the code affects the benefits that the killer would otherwise have derived on the death of the victim.
- 5.35 Legislation of this type would provide certainty to administrators and executors in administering and distributing the estate. As discussed in Chapter 3, there is some uncertainty about the ambit of the rule at common law. For example, when the New South Wales Attorney-General's Department reviewed the NSW Act in 2002, the Public Trustee submitted that the Act should be amended to clarify when a legal personal representative can apply the rule. The Department's response was:
- If a legal personal representative is unsure whether the forfeiture rule applies to the administration of an estate, they are free to apply to the Supreme Court for clarification.³⁰
- 5.36 If the rule were codified, a personal representative may not have to apply to the court for clarification, saving time and costs to the estate. A codified rule could also clarify which property the killer forfeits and how it is to be distributed. This would assist in resolving uncertainty about many of the issues discussed in Chapters 3 and 4.
- 5.37 The reasons why the New Zealand Law Commission recommended legislation that established a statutory code rather than a statutory discretion included:
- Uncertainty about precisely how the rule should be applied in particular circumstances.³¹
 - The expense and delay of having the judiciary deal with all cases as they arose.³²
 - The desirability of having such a policy-based area of the law dealt with by parliament.³³
 - An apparent lack of consistency in decisions made under the United Kingdom legislation.³⁴
- 5.38 In its review of the forfeiture rule, the Tasmania Law Reform Institute canvassed views on the legislation proposed by the New Zealand Law Commission. However, it found no support for this option and did not recommend it.³⁵
- 5.39 Codifying the rule in Victoria would be inconsistent with the style of legislative intervention taken in other Australian jurisdictions. However, as noted above, the introduction of the ACT Act and the NSW Act has drawn the attention of courts in those jurisdictions to the effect of the rule in the circumstances of the case, rather than on whether the rule applies at common law. More widely, problems with the application of the rule appear to arise infrequently and there are few opportunities presented to the courts to clarify the operation of the rule.

Question

15 Should Victoria codify the common law rule of forfeiture?

30 New South Wales, *Report on the Review of the Forfeiture Act 1995: New South Wales Attorney-General's Department*, Parl Paper No 72 (2002), 9.

31 Law Commission (New Zealand), *Succession Law: Homicidal Heirs*, Report No 38 (1997) 2.

32 Ibid.

33 Ibid, 5.

34 Ibid.

35 Tasmania Law Reform Institute, above n 18, 22.

Specific considerations

- 5.40 Codifying the common law rule would enable a number of specific issues to be clarified in the legislation. The following are presented for comment and with a view to encouraging suggestions about other aspects of the rule that the legislation could usefully clarify.

Moral culpability

- 5.41 If codification of the rule replaces one inflexible law with another, it is unlikely to resolve the concerns about the effect of the common law rule in manslaughter cases where the killing was intentional but the level of moral culpability is low.
- 5.42 The common law rule of forfeiture does not allow a court to take moral culpability into account; nor does the *Succession (Homicide) Act 2007* (NZ) (NZ Act). For the purposes of the NZ Act, a killer is someone who is 'guilty, either alone or with another person or persons' of homicide 'or would be so guilty if the killing had been done in New Zealand'.³⁶ It has been argued that the New Zealand Law Commission's report indicates that 'the rule is to be applied to all intentional killings'.³⁷ It thus appears that there is no scope under the Act to modify or remove the effect of the rule in cases of lesser moral culpability.
- 5.43 To address concerns about the indiscriminate application of the codified rule, perhaps the legislation could allow for exceptions. For example, it could establish a scheme for a court to find, on application by a person convicted of manslaughter, that applying the rule would be inappropriate in the circumstances. However, those circumstances would need to be carefully specified so as to minimise uncertainty and not undermine the statute.

Application to a person who has not been convicted

- 5.44 The NZ Act allows for 'any party' to allege that a person is guilty of homicide for the purposes of the Act.³⁸ In this way, the codified rule may be applied to a person who has not been prosecuted for the killing, or who has been acquitted in criminal proceedings.³⁹ As discussed in Chapter 3, this is consistent with the common law rule as it operates in Victoria.
- 5.45 The court decides whether the alleged killing took place and whether, if there had been a New Zealand prosecution, the alleged killer would be guilty, or not guilty by reason of insanity, of the homicide.⁴⁰ An alleged killer who wishes to plead that they are not guilty on grounds of insanity must prove that fact on the balance of probabilities.⁴¹
- 5.46 If the alleged killer has been convicted of the homicide in a jurisdiction other than New Zealand, that conviction is admissible evidence concerning the person's guilt or innocence of that homicide for the Act's purposes.⁴² The court may give that evidence any weight it determines.⁴³ The person alleging that another person is guilty of homicide for the purposes of the NZ Act bears the onus of proving that fact on the balance of probabilities.⁴⁴
- 5.47 The Commission welcomes submissions on whether a Victorian Act should include similar provisions.

Change of circumstances

- 5.48 When the *Succession (Homicide) Bill* was being debated in the New Zealand Parliament, one speaker noted that it does not make clear what would happen if the death was not

36 *Succession (Homicide) Act 2007* (NZ) s 4(1).

37 Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31 (1) *Common Law World Review* 1, 29; Law Commission (New Zealand), *Succession Law: Homicidal Heirs*, Report No 38 (1997) 5.

38 *Succession (Homicide) Act 2007* (NZ), s 16(1)(a).

39 *Ibid* s 16(1)(b).

40 *Ibid* s 16(2)(a).

41 *Ibid* s 16(2)(c).

42 *Ibid* s 16(2)(d).

43 *Ibid* s 16(2)(d).

44 *Ibid* s 16(2)(b).

‘attributed to the killer’ until years after the killing, and the estate had been distributed in the interim, including to the killer.⁴⁵ She thought that the legislation should address whether the estate would be redistributed in such a case.⁴⁶

- 5.49 This observation is relevant to the case of David Bain, who was acquitted of the murder of his parents, brother and two sisters on a retrial after serving part of a life sentence. The estate was distributed long before the eventual acquittal, and while Bain’s lawyer called for the beneficiaries to return the money to Bain, it is unknown whether this was pursued, and what the correct outcome would have been under the NZ Act.⁴⁷
- 5.50 It may be desirable for any codified rule in Victoria to specify how the property should be allocated in changed circumstances such as these, perhaps limiting the period within which a redistribution could be ordered.

Question

- 16 If Victoria introduced legislation that codified the common law rule of forfeiture:
- (a) How should it allow for exceptions, such as where the code would normally be applied but in view of the circumstances of the killing it would not be justified?
 - (b) How should it provide for the code to be applied to a person who has not been prosecuted, or was found not guilty because of mental impairment?
 - (c) How should it accommodate changes in circumstances, such as where a crime is resolved many years after the event, or a person’s conviction is overturned?
 - (d) What other matters should be addressed in a codified rule (and how)?

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New Zealand, Parliamentary Debates, House of Representatives, 8 May 2007, 8990 (Kate Wilkinson).

Ibid.

‘Case of Bain family estate remains cloudy’, The New Zealand Herald (online), 9 June 2009 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10577298>

Conclusion

6. Conclusion

- 6.1 This consultation paper has covered a broad range of issues relevant to the application and consequences of the forfeiture rule as well as canvassing potential options for reform.
- 6.2 The Commission welcomes submissions from all areas of the community. It particularly invites submissions from those who have been affected by the forfeiture rule as well as from professionals with specialist knowledge in succession law, criminal law, property law and mental health.
- 6.3 You can provide input into the Commission's review of the forfeiture rule by responding to the questions throughout the paper. The Commission's questions are also included at the back of this paper. Information about how to provide the Commission with a submission is on page vi. To allow the Commission time to consider your views before deciding on final recommendations, **submissions are due by 28 April 2014.**
- 6.4 Your responses to these questions will assist the Commission to determine whether changes are needed to improve the operation of this specialised but important area of the law.

Questions

Questions

- 1 What has been the effect of the *Forfeiture Act 1991* (ACT) on the application and operation of the forfeiture rule in the Australian Capital Territory?
- 2 In Victoria, should the forfeiture rule be applied equally to all types of unlawful killing? If not:
 - (a) Which types of killing should be excluded from the operation of the rule?
 - (b) On what basis should they be excluded?
- 3 Should the forfeiture rule apply equally to all unlawful killers? If not:
 - (a) Should the courts be able to consider moral culpability?
 - (b) What other factors should be taken into account?
- 4 Should the absolute exception to the forfeiture rule for persons found not guilty by reason of mental impairment be retained? If not:
 - (a) In what circumstances should the exception not apply?
 - (b) Should the court have a discretion to apply the rule in the circumstances of the case?
- 5 How should contingent gifts over be distributed upon the application of the forfeiture rule?
- 6 Should the courts have a discretion to rectify a will to fulfil the will-maker's probable intent?
- 7 Should Victoria's intestacy laws permit an unlawful killer's descendants to inherit from the victim, as representatives of the killer?
- 8 Are there any circumstances in which an unlawful killer's descendants should be prevented from inheriting from the victim?

- 9 How should the courts distribute property subject to a joint tenancy once the forfeiture rule has been applied?
 - (a) Should an unlawful killer be able to retain their interest in the property?
 - (b) Should the victim's estate be able to keep the victim's interest in the property where there are multiple joint tenants?
- 10 How should the forfeiture rule apply to other assets that are not within the deceased's estate?
- 11 Should the forfeiture rule prohibit an unlawful killer from applying for a share of the victim's estate under family provision legislation?
- 12 Should issues about the effect of the forfeiture rule on the property and benefits that the killer would otherwise have derived on the death of the victim be addressed by amending the existing legislation under which the property of a deceased person is distributed?
- 13 Should Victoria introduce legislation, like that in the United Kingdom, Australian Capital Territory and New South Wales, that empowers a court to modify the effect of the forfeiture rule?
- 14 If Victoria introduced legislation that empowers a court to modify the effect of the forfeiture rule:
 - (a) Who should be able to apply for the rule to be modified?
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 - (d) What other matters should be addressed in a codified rule (and how)?

Notes



